United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

118

BRIEF FOR APPELLANT HOWARD WINGFIELD

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24362

UNITED STATES OF AMERICA

v.

HOWARD WINGFIELD,
Appellant

APPEAL FROM THE REVOCATION OF
APPELLANT'S CONDITIONAL RELEASE
FROM SAINT ELIZABETHS HOSPITAL
BY THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR APPELLANT

ISSUES PRESENTED FOR REVIEW

1. Whether a person who was released conditionally from Saint Elizabeths Hospital, on the strength of a court ruling that he had so far recovered from his mental illness that he was not likely to be dangerous to himself or others, may consistently with the governing statute be recommitted to the Hospital for an indefinite period more than two years later without the benefit of a jury trial.

2. Whether such a person is denied the equal protection of the laws when by his recommitment he is deprived of his liberty indefinitely without the jury trial that is available to other classes of persons prior to involuntary confinement.

3. Whether such a person, so released and so recommitted without a jury trial, is deprived of his liberty without due process of law.

This case has not previously been before this Court.

REFERENCES TO RULINGS

The formal order of the Court below (Walsh, District Judge) revoking appellant's conditional release from Saint Elizabeths Hospital is dated May 11, 1970, and was filed May 12, 1970 (Record). The order was entered pursuant to the district court's oral decision at a "mental hearing" held on May 7, 1970. Pages 31-40 of the transcript ("Tr.") of this hearing contain an extended discussion of appellant's request for jury trial. Counsel for appellant made this request five separate times: Tr. 32, 33, 35, 37-38, 39; the request was opposed by the government (Tr. 38), and the revocation decision was rendered without the holding of a jury trial (Tr. 39, 40).

STATEMENT PURSUANT TO

GENERAL RULE 17(c)(2)(iii)

The transcript of the proceeding below is only forty pages long. Appellant respectfully requests that it be reproduced in full and that the Court read it in its entirety, a full overview of the hearing being a prerequisite to a fair understanding of appellant's contentions.

Apart from this transcript, appellant has reproduced, and has included in Appendices to this brief, all other material to which he wishes to direct the Court's attention (except, of course, for cited materials such as cases, congressional hearings, etc.).

STATEMENT OF THE CASE*/

This is an appeal from the district court's revocation of appellant's conditional release from Saint Elizabeths Hospital without a jury trial.

Ten years ago appellant was indicted on several counts of Harrison Act (narcotics) violations (Record). Shortly thereafter he entered a plea of

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*/ Appellant includes as Appendix I copies of documents from his official hospital file, some of which are used as background illumination in this Statement of the Case, and others in the final section of the Argument. The court below did not consider such material in denying appellant's request for jury trial, but since this decision was purely a legal one, appellant is not improperly "going outside the record" in referring to his hospital file now. In Covington v. Harris, 136 U.S. App. D.C. 35, 38 n.1, 43 n.27, 45, 46 n.39, 419 F.2d 617, 620 n.1, 625 n.27, 627, 628 n.39 (1969), the challenge was to decisions not purely legal; this Court nevertheless adverted to hospital records that had not been before the court below in order to establish a proper factual and analytical background for its decision. In Covington this Court ultimately concluded that the court below should have had the benefit of such records in resolving the factual issues and remanded the case on this ground, among others. Id. at 44, 419 F.2d at 626. Here, however, because the question is purely a legal one, no such remand is required. This Court may appropriately use the appended file entries not only for background illumination, but also as factual data bearing on the resolution of the due process issue presented in Section III of the Argument, infra. Compare, e.g., Muller v. Oregon, 208 U.S. 412 (1908), and In re Gault, 387 U.S. 1 (1967).

not guilty, his court-appointed counsel moved for a mental examination, and in January 1961 he was committed to Saint Elizabeths for observation.

In April 1961 the Superintendent of the Hospital informed the Court that appellant was incompetent to stand trial, and an order was entered committing him to the Hospital until competent. (Record). About a year later (February, 1962; Record) the Superintendent informed the Court that appellant had become competent to stand trial; in April 1962, he was tried by a jury and found not guilty by reason of insanity. (Record). Appellant was thereupon recommitted to the Hospital pursuant to 24 D. C. Code § 301 (d). (Record). Because this was long before the decision of this Court in Bolton v. Harris, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968), appellant was recommitted automatically without any inquiry into his present mental state. His diagnosis was "Schizophrenic Reaction, Catatonic Type" (Record, letter from Dale C. Cameron to Clerk, Criminal Division, United States District Court for the District of Columbia, February 5, 1962).

Appellant remained confined in the Hospital for nearly six years, until he was released conditionally on December 1, 1967, pursuant to his doctor's recommendation and upon an order of the District Court that rested

upon an express judicial finding that appellant had "recovered sufficiently from his mental illness so that he will not in the reasonable future be dangerous to himself or others." (Record). The conditions of appellant's release were that he be released into the personal custody of his father, that he live with his parents, that he take prescribed medicine under his father's supervision, that he return to the Hospital for interviews as directed, and that he cooperate with a Hospital functionary in trying to find a job. Appellant observed these conditions as long as they were imposed; continuous medication, the principal condition, was discontinued by the Hospital in April 1968. Appellant found a job and apparently had no difficulty until October 27, 1968 (a period of about eleven months). On that date he "responsibly" (Tr. 24) returned voluntarily to the Hospital

> and requested that he be allowed to sleep for the night. He stated that he had had a fight with his family, that he did not want to remain at home and that he did not have another place to sleep.
>
> Official Hospital Record: "Return From Convalescent or Authorized Leave," October 28, 1968 (Appendix I, Item I) (emphasis added).

The precise nature of the family fight was never looked into by the Hospital, which is still unclear as to what happened (see Tr. 11; Official Hospital Record: "Recommendation for Revocation of Conditional Release and Change of Diagnosis," page 1, (Appendix I, Item 2)).

For 13 months following his request to stay the night appellant remained confined in the Hospital's maximum security facility. Below, the Hospital claimed that appellant remained "voluntarily". Although "[h]e would frequently ask for releases [he could] always be talked out of the request." (Tr. 12-13) Apparently the Hospital kept no record of such requests or of the lengths to which it may have had to go to "talk appellant out" of them. One item in the Hospital records, however, indicates that during appellant's 13-month stay in John Howard Division, the maximum security facility, he was not regarded as a voluntary patient. Appellant wrote to Dr. George D. Weickhardt, the acting clinical director of John Howard Division, asking about his status. (Appendix I, Item 3). Dr. Weickhardt promptly replied:

> In response to your letter, we thought it would be best to revoke your conditional release at this time.
>
> Letter to appellant dated November 4, 1969. (Appendix I, Item 4).

This letter, of course, was written six months before appellant's conditional release was actually revoked in May 1970. The Hospital took the view that an inquiry into his status made by a voluntary patient raised a "serious question as to whether he was competent to remain on a voluntary commitment." (Tr. 13).

Meanwhile, the Legal Aid Agency had learned of appellant's situation, and a lawyer newly assigned to appellant's case began to inquire into his status. A letter addressed to Dr. Weickhardt on September 22, 1969 (Appendix I, Item 5) requesting a current examination pursuant to the second holding in Bolton v. Harris, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968), met with no response. A letter to the Superintendent dated October 29, 1969, was answered on November 4. (Appendix I, Item 6). In his answer the Superintendent stated that a Bolton re-evaluation had been made, and that pursuant to this re-evaluation the Superintendent had recommended to the court that appellant's conditional release be revoked.

The Bolton evaluation was described by the doctor who made it as follows:

> I have interviewed Mr. Wingfield brriefly [sic] last week and again today and have reviewed his case records.
> . . .

> [After reviewing and analyzing recent developments] [i]t is . . . my opinion that Mr. Wingfield is mentally ill and would be dangerous if released from the hospital and in view of the clear possibility of legal action being initiated by his attorney, I feel that we should cover ourselves at this time by formally requesting that the Court revoke his conditional release . . ..
>
> Official Hospital Record: "Recommendation for Revocation of Conditional Release and Change of Diagnosis," November 4, 1969 (Appendix I, Item 5).

After unsuccessful private attempts to secure an independent psychiatric evaluation, appellant moved the court for an order that such an evaluation be made; an independent evaluation was ordered (Record: March 2, 1970) and was made on March 24, 1970; a copy of the report of the evaluation was filed with the Court late in April. On April 29 appellant's case was set down for the May 7, 1970, "mental hearing" below.

At that hearing, after both appellant's Saint Elizabeths doctor and the independent psychiatrist testified that because of his potential dangerousness he should remain in the Hospital (e.g., Tr. 5, 6, 13), counsel for appellant (another Legal Aid Agency lawyer only recently involved in the case) five times reiterated a request for a

jury trial on the question whether appellant's conditional release should be revoked. (Tr. 32, 33, 35, 37-38, 39). The Hospital opposed the request (Tr. 38). Judge Walsh revoked appellant's conditional release without a jury trial. (Tr. 39, 40.) Only after -- indeed, as a result of -- this hearing, which sanctioned maximum security confinement on the grounds of dangerousness, was appellant transferred out of maximum security -- into minimum security confinement. Official Hospital Record: "Recommendation For Transfer To Cruvant B," Appendix I, Item 7.

ARGUMENT

Introduction

Appellant was acquitted by a jury of a criminal offense. Following 24 D.C. Code § 301(d) as it was then understood -- prior to this Court's decision in Bolton v. Harris, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968) -- he was committed to Saint Elizabeths Hospital. He remained in the Hospital for six years and then was recommended for and held entitled to be released on conditions because, as the court found, he had "recovered sufficiently from his mental illness so that he will not in the reasonable future be dangerous to himself or others." The principal conditions were that he remain under the supervision of his father and continue his medication. There is no indication that he ever breached these or any other conditions of his release. In fact, medication was discontinued a few months after appellant's release, and he had no apparent difficulty for the following six months.

He came back to the Hospital after a family quarrel to stay the night, because he had no other place to go. As it turned out, he stayed not just for a night but for more than a year. The Hospital officials testified below that his stay was voluntary, but contemporaneous records cast doubt on whether he was regarded as a voluntary patient at the time. (P. 6, supra.) In any event, it was only after 13 months that the Hospital asked the court below to revoke appellant's conditional release. On psychiatric testimony that dealt with the state of appellant's mental health and his potential dangerousness the court, sitting without a jury, revoked his conditional release. It denied appellant's repeated requests for a jury trial. He was thereupon committed to Saint Elizabeths Hospital against his will, to stay indefinitely.

If the decision below is allowed to stand, appellant and others situated like him will be singled out from among those adults subject to indefinite confinement against their will in Saint Elizabeths Hospital as a result of potential dangerousness due to mental illness.

All other classes of adults subject to such confinement are entitled to a jury trial; these classes are:

(1) persons who are mentally ill and who, because of their illness, are likely to injure themselves or others if allowed to remain at liberty, 21 D.C. Code § 521, but only after jury trial if one is requested, 21 D.C. Code §§ 544-45.

(2) sexual psychopaths, but only after a jury trial if one is requested, 22 D.C. Code § 3508.

(3) persons acquitted of offenses solely on the basis of insanity, 24 D.C. Code § 301(d), but only after a jury trial as to present mental condition and dangerousness, if one is requested, Bolton v. Harris, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968).

(4) persons serving sentences in D.C. penal institutions who are mentally ill, 24 D.C. Code § 302, but only after a jury trial if one is requested, Matthews v. Hardy, ____U.S. App. D.C. ____, 420 F.2d 607 (D.C. Cir. 1969) cert. den., 397 U.S. 1010 (1970).

Congress has not called for such discrimination against persons who have been conditionally released, the court below has not justified it, and there is no rational basis for its being sanctioned by this Court. 1/

1/ Under 24 D.C. Code § 301(a) a court that finds a defendant incompetent to stand trial is to order him "confined to a hospital for the mentally ill." The question whether automatic commitment of an incompetent criminal defendant is valid has not been posed to or decided by this Court. But the case of the incompetent defendant is distinguishable from that of the conditional releasee and those of the other classes of persons described. The incompetent is confined not for reasons having to do with the safety or welfare of himself or others, but because he is under criminal charges on which he should be tried; he should therefore be treated for whatever condition prevents his being tried. The determination of competence or incompetence has typically been made by a judge, and confinement has been thought to follow inevitably from a determination of incompetence. We are more sensitive today than we were when the automatic confinement provision of § 301(a) was enacted, both to the desirability of pretrial release of defendants and to noninstitutional treatment of mental ills. A more rational scheme than the present § 301(a) would make out-patient treatment the norm for the incompetent, but presumed innocent, defendant (who, it is assumed, is eligible for release on bail or on his own recognizance), unless in a particular case institutional treatment was medically indicated or the condition causing the defendant's incompetence also made him dangerous to himself or others. It may be, on the logic of appellant's arguments in this brief, that the latter determination would have to be made by a jury.

In what follows we shall demonstrate that (1) Congress, in providing for conditional release, manifested no intention to discriminate against all persons so released by making them subject to indefinite reconfinement without the jury trial to which others subject to indefinite confinement are entitled, and that because of the serious constitutional questions that would otherwise arise the statute should not be construed to permit recommitment without a jury trial; (2) if the statute is read as authorizing the reconfinement of appellant without a jury trial it denies him the equal protection of the laws and thus violates the due process clause of the Fifth Amendment, and (3) in cases such as appellant's reconfinement without a jury trial works a deprivation of liberty without due process of law even without regard to equal protection concepts.

I. THE APPLICABLE STATUTES SHOULD BE SO READ AS TO CONFER UPON APPELLANT THE RIGHT TO A JURY TRIAL

A. Congress Has Manifested No Intent To Deprive Conditional Releasees In Appellant's Position Of A Jury Trial Prior To Revocation Of Their Release

That part of the District of Columbia Code which deals with "insane criminals" underwent a general revision in the aftermath of Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954). The revision resulted in the enactment of 24 D.C. Code § 301(d), which provides for confinement in a mental hospital, pursuant to court order, of persons acquitted of criminal charges by reason of insanity. Section 301(e) contains the provisions for the release of such persons. Besides providing for outright release, it also provides that

> Where, in the judgment of the superintendent of [the] hospital a person confined under [24 D.C. Code § 301(d)] is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, . . . [after complying with specified procedural requirements] the court shall order his release under such conditions as the court shall see fit . . ..

The citizens committee that was responsible for the revision of § 301, after stating in its report "that the law should provide a means for conditional release of persons who have recovered after being acquitted on the ground of insanity," asserted that conditional release would, inter alia, "permit immediate recommitment for treatment of those conditionally released where subsequent experience and

psychiatric observation indicated that their release had been premature." H.R. Rep. No. 892, 84th Cong., 1st Sess. 14 (1955); S. Rep. No. 1170, 84th Cong., 1st Sess., 14 (1955).[1/] But the statute, while accomplishing other stated committee objectives regarding conditional release, incorporated no provision at all for recommitment, immediate or otherwise.

This Court, however, appropriately giving legal content to a statutory area uncharted by the Congress, held that an "order for conditional release [can] be revoked only by the court which granted it, and only after a full hearing." Darnell v. Cameron, 121 U.S. App. D.C. 58, 60, 348 F.2d 64, 66 (1965) (emphasis added); see also Friend v. United States, 128 U.S. App. D.C. 323, 388 F.2d 579 (1967). Its ruling was effectively ratified by the Congress, which amended § 301 in 1967, two years after Darnell had been decided, without modifying § 301(e) in any relevant respect.

1/ The Committee was the Committee on Mental Disorder of the Council on Law Enforcement of the District of Columbia. Its report is printed in full in the reports of the responsible congressional committees. There is no other material legislative history.

The further step in the construction of the statute urged here -- that it be so construed as to require a jury trial for appellant and others situated like him -- would further fulfill Congress' general purpose, discussed below, to make jury trial available in mental commitment cases, thereby vindicating as well the benign doctrine of equality of treatment that had its source in Baxstrom v. Herold, 383 U.S. 107 (1966).[1/]

B. Congress Has Manifested A Sharp Concern For Ensuring Jury Trials In Mental Commitment Cases.

The history of the jury trial provision of the Hospitalization of the Mentally Ill Act of 1964, 21 D.C. Code §§ 544-45, is enough to demonstrate the extreme solicitude of the Congress for the right to a jury trial in mental hospital commitment cases.[2/]

1/ Baxstrom does not have the same popular currency as, say, Miranda v. Arizona, 384 U.S. 436 (1966), and some others of the Supreme Court's landmark decisions of recent years, but in a recent address to the Federal Bar Association the Secretary of Health, Education and Welfare, a distinguished lawyer, named Baxstrom as one of several notable examples of the Court's recent sensitive regard for the demands of equal treatment. Remarks by Elliot L. Richardson, Secretary of Health, Education and Welfare, before the Federal Bar Ass'n., Sept. 18, 1970, pp. 7-8. Saint Elizabeths Hospital is in Secretary Richardson's department.

2/ Compare Matthews v. Hardy, ____ U.S. App. D.C. ___, 420 F.2d 607 (D.C. Cir. 1969), cert. den., 397 U.S. 1010 (1970): "We have not found anything in the legislative history of the 1964 Act which indicates that Congress explicitly intended to deny its protections, for any stated reason, to prisoners."

Despite the fact that until 1938 jury trials were had in all cases of involuntary civil commitment, and that from 1938 through the time of the preparation of the Act of 1964 jury trials were available to all who wished them,[1] the 1964 Act as it originally appeared eliminated any right to jury trial.[2] Although this aspect of the bill was applauded by the psychiatrists who testified at the hearings, it was uniformly opposed by lawyers and judges; the legal profession insisted on the inclusion of a right to a jury trial.[3]

In responding to the ACLU's testimony "strongly urg[ing]" reinstatement of the jury trial guarantee, Senator Ervin (the bill's sponsor and chairman of the subcommittee) said:

1/ See, e.g., Hearings on S.935 Before the Constitutional Rights Subcommittee of the Senate Judiciary Committee, 88th Cong., 1st Sess., ser. 20-127, at 8 (1963).

2/ Id. at 8.

3/ Id. at 61, 62 (psychiatrists); at 22, 26 (Judge Holtzoff); 33, 37 (Chief Judge McGuire); 50; 185, 186 (ACLU); 195; 203.

> [T]he subcommittee appreciates very much ... the very valuable suggestions you made for the improvement of the law [by requiring jury trials, inter alia].
>
> I think the suggestions are extremely helpful, particularly those pertaining to guarantees to insure due process. Id. at 186 (emphasis added).

Later, in response to still another attorney's presentation, Senator Ervin observed, "I have a deep veneration for the right of trial by jury and I consider it as one of the basic rights." Id. at 218.

Doubtless on the strength of such suggestions as the ACLU's and those of the other lawyer witnesses, which engendered legislative reactions such as those just quoted, the law as enacted included the now-familiar provisions for jury trial. These are among the provisions that this Court has borrowed for application, mutatis mutandis, to all persons acquitted by reason of insanity,[1] and to unwilling transferees to Saint Elizabeths from correctional institutions.[2]

1/ Bolton v. Harris, 130 U.S. App D.C. 1, 395 F.2d 642 (1968).

2/ Matthews v. Hardy, ___ U.S. App. D.C. ___, 420 F.2d 607 (1969).

C. A Jury Trial Requirement Should Be Read Into Section 301(e) In Any Event To Save It From Constitutional Attack.

In construing the statutes before it in Bolton and Matthews as it did, the Court was moved quite candidly by the desire to save the statutes from what it considered a devastating constitutional attack. The attack is based principally upon the Supreme Court's decision in Baxstrom v. Herold, 383 U.S. 107 (1966), which invalidated as a denial of equal protection a New York statute that authorized civil commitment of a prisoner at the end of his penal sentence without the jury review that was available in all other civil commitment cases.

As this Court phrased the matter in the Bolton case:

> [W]hile prior criminal conduct may be relevant to the determination whether a person is mentally ill and dangerous, it cannot justify denial of procedural safeguards for that determination, [and] ... while prior criminal conduct is a relevant consideration for determining the conditions of custodial care, it does not provide an automatic basis for allowing significant and arbitrary differences in such conditions.

"Prior criminal conduct," this Court continued,

> cannot be deemed a sufficient justification for substantial differences in the procedures and requirements for commitment, and habeas corpus may no longer be deemed to afford adequate protection against unwarranted detention.

The Court on this basis held that "persons found not guilty by reason of insanity must be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings." 130 U.S. App. D.C. at 10, 395 F.2d at 651.

In Matthews this Court continued the eradication of arbitrary differences in the treatment of civil and criminal committees. Matthews allegedly became mentally ill while at Lorton penitentiary. Purportedly pursuant to 24 D.C. Code § 302 he was transferred to the maximum security facility at Saint Elizabeths, with neither hearing nor jury trial. Recognizing that the mere fact of appellant's prior criminal conviction yielded no basis for a determination that he was dangerously mentally ill, this Court held that the prisoner must be afforded all of the safeguards, including the right to trial by jury, that are available to civil committees -- that § 302 could be "saved" only by reading into it the protections of the Hospitalization of the Mentally Ill Act.

In the same way, the conditional release provisions of Section 301(e) can be "saved" only by reading into them procedures to be had upon revocation in appellant's case and others like it that correspond with the procedures of the 1964 Act, including the right to

jury trial. The arbitrariness of the denial of a jury trial to appellant and others like him is clear. Appellant and others confined to Saint Elizabeths pursuant to § 301 (d) before Bolton was decided were never even adjudicated mentally ill or dangerous. They were confined on the sole basis of a jury's or a judge's reasonable doubt that at some time in the past they were stable enough mentally that it would be fair to hold them criminally responsible for their conduct.[1/] Appellant, furthermore, was conditionally released pursuant to a judicial order based on a finding that he would not be dangerous under the conditions imposed; this is the only current judicial finding in his record.

Thus, there is nothing in appellant's situation to justify making it easier to commit him for an indefinite period by omitting some procedural safeguard than it is to commit others. Quite the contrary. To the extent that the state of his mental health is relevant, he is formally no differeni from any prospective civil committee in that, whatever may be the views of attending

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1/ Intervening attempts to secure release on habeas corpus do not materially alter the situation in this regard. There is no opportunity for jury trial in such cases, and the burden of proof is on the patient. Prior to Bolton, patients had to prove freedom from a dangerous mental condition beyond a reasonable doubt, and, in some cases, that the Superintendent's refusal to recommend release was arbitrary and capricious. See Bolton, text at notes 23, 24.

psychiatrists, he has not been found mentally ill by a jury.[1/] And he is a more likely risk than the usual civil commitment defendant insofar as dangerousness is concerned because it has been determined that he will not be dangerous under conditions that, in appellant's case, were not alleged to have been breached during release. Some of the other features of appellant's situation at the time of the hearing are described in subsequent sections of this brief.

D. A Decision That Appellant Is Entitled To A Jury Trial Will Not Impair The Use Of The Conditional Release Technique.

We have spoken throughout of appellant and others situated like him as being entitled to a jury trial. The choice of words has been deliberate. There may be room for distinguishing the circumstances of particular revocation-of-conditional-release cases from one another insofar as entitlement to a jury trial is concerned. The burden of our argument in what follows is twofold: whatever line may ultimately be drawn,

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1/ Patients who are no longer mentally ill are entitled to unconditional release, whether they are thought to be dangerous or not. Patients who though still mentally ill would not be dangerous if released under suitable conditions are entitled to conditional release. United States v. McNeil. D.C. Cir. No. 24,263, decided Aug. 28, 1970, slip op. p. 19 (Bazelon, C.J., concurring). On an attempt to revoke a conditional release, however, a patient would clearly be entitled to show that he is no longer mentally ill.

appellant is clearly on the side of the line where a jury trial is required, and to require a jury trial in appellant's and similar cases need have no chilling effect on the use of conditional release.

Beginning with this Court's decision in Hough v. United States, 106 U.S. App. D.C. 192, 271 F.2d 458 (1959), the first case construing the statute's conditional release provisions, there have evolved two basic types of conditional release:

(1) Conditional releases for limited purposes that expire by their own terms: Hough required that any absence from Hospital grounds, for whatever purpose, be preceded by a grant of conditional release. 106 U.S. App. D.C. at 196, 271 F.2d at 462. Appellant himself was the beneficiary of a typical self-limiting conditional release order; it permitted him to view the body of his recently deceased brother (Record, Order filed October 24, 1967). No one would contend that at the end of such a release there ought to be a jury trial before the patient may be returned to confinement; the order for such conditional releases may properly contain provisions that expressly terminate the release without need for further formalities.

(2) Conditional releases ordered as part of a continuing course of therapy which is expected to see the patient progress toward unconditional release constitute a wholly distinct class. Chief Judge Bazelon's concurring opinion in United States v. McNeil, ____ U.S. App. D.C. ____, ___ F.2d ___ (D.C. Cir..No. 24,263, August 28, 1970), cases cited therein, and especially Covington v. Harris, 136 U.S. App. D.C. 35, 419 F.2d 617 (D.C. Cir. 1969), make it clear that the patient for whom conditional release is appropriate is entitled to conditional release as a matter of right, because commitment to the custody of Saint Elizabeths may involve no greater restrictions than are necessary for the protection of the patient and society. Appellant assumes that this legal entitlement will in no way be derogated by the Hospital merely because some conditional releasees may ultimately be entitled to a jury trial prior to reimposition of major restrictions. And, of course, should the Hospital seek to ignore such entitlement to conditional release the patient may resort to habeas corpus under § 301(g) in order to protect his rights. It follows from the least-restrictive-alternative principle that release conditions that once may have been necessary and lawful may become unnecessary and unlawful as the

patient progresses, and that this must be taken into account in any attempt to reimpose restrictions.

We suggest the possibility that in the very early stages of release, violation of a condition clearly related to dangerousness could constitute a ground for revocation without a jury trial. In such a case the court that holds the revocation hearing -- which is required in any event -- may be called upon to decide, subject to appropriate review, whether a jury trial is necessary.[1/] A case illustrative of what we have in mind is that of a patient, released on the condition that he not drink because he becomes dangerously psychotic under the influence of alcohol, but who is discovered raving drunk two days after release.

But appellant's situation stands in stark contrast to that hypothetical case. Appellant lived with his family, as ordered by the court, for about eleven months. He was ordered to do so essentially for two reasons, as revealed by the transcript of the December 1, 1967 release proceedings (copy attached as Appendix II). First, there was a need to see that he took his medicine; his father

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1/ This would be much like any determination of a motion for summary judgment or judgment n.o.v.; the judge is simply asked to decide whether there is a substantial question of fact.

was to oversee this (Appendix II at 6-7). Second, his family was relied upon to report any difficulty of an emergent nature to the Hospital (id. at 8). His family was also expected to exert a good influence on him (id. at 9), but his medicine was basically to be relied upon to hold his mental illness in remission -- it was "extremely important that he continue to take the medicine" (id. at 7).

As appellant progressed, however, the Hospital itself gradually reduced his medication and finally discontinued it altogether on April 13, 1968 (Appendix I, Item 1, page 1). Appellant stayed on his job, lived at home, and had no apparent difficulty for more than six months thereafter, until the altercation with his family took place. (In view of this six-month period, the government doctor's assertion at the revocation hearing that "he had a relapse of his psychosis following the discontinuation of medicine" -- Tr. 15 -- was misleading, to say the least.) For the reasons stated by this Court in Williams v. Robinson, ___ U.S. App. D.C. ___, ___, F.2d ____ (D.C. Cir. No. 23,763, June 19, 1970), this "determination" was entitled to little weight as matters stood at the time of the hearing, and is entitled to

equally little now, in support of a contention that appellant had once again become dangerous. The Hospital never investigated the details of this incident; the only clarification available is a description of a telephone call, apparently from appellant's brother, to the effect that there had been a fight and that appellant had injured his parents to some extent. (Appendix I, Item 1). The Hospital did not think the episode serious enough even to warrant an investigation, which might have supported a reasoned medical conclusion and which therefore might -- but only might -- have provided the basis for a revocation of release. (Not all family fights, after all, not even those involving formal mental patients or criminals, nor even those involving bodily harm, result in indefinite involuntary confinement without a jury trial. As recognized in Friend v. United States, 128 U.S. App. D.C. at 326, 388 F.2d at 582, a change in conditions might have been preferable to renewed confinement, even if there were competent proof of the breach of a dangerousness-related condition.)

However, needing a place to sleep and unable to continue to live with his family, appellant "responsibly" (Tr. 24) returned to the Hospital, remained there "voluntarily" (but see pages 6-7, supra) and did "very well" (Official Hospital Record: Recommendation For Transfer To Cruvant-B). He progressed despite the fact that for five months his doctor used the pendency of revocation proceedings, rather than appellant's mental condition and dangerousness, as an excuse for refusing appellant less restrictive confinement, although appellant was still on conditional release. (Id.). In a move reminiscent of Kafka, appellant was eventually transferred from maximum to minimum security -- but only after, and on the basis of, revocation of his conditional release on grounds of his dangerousness![1/]

1/ (Id.) Compare Darnell v. Cameron, 121 U.S. App. D.C. 58, 348 F.2d 64 (1965), in which the Hospital procured revocation of conditional release by misleading a court into thinking that a patient had escaped from the Hospital, although he had been out on conditional release for two years. While on release the patient was arrested for commission of a crime; the police returned him to the Hospital, which he left after the authorities attempted to hold him there without revocation proceedings. This Court held that despite his arrest and return by the police, the Hospital could not seek revocation on the basis of escape when in fact -- even after his arrest -- the patient was never the Hospital's to hold. (fn. cont.)

For over six months, then, although appellant was technically a "patient" he was receiving no treatment. It is reasonable to ask whether at some point he did not become entitled to unconditional release. Unconditionally released, he clearly would be entitled to a jury trial before he was committed again. At the very least the condition that he take his medicine lapsed, much of the need for family supervision lapsed with it, and appellant was well on his way to unconditional release, if not already entitled to it, when the episode with his family occurred. But because this unassessed family dispute left him without a place to sleep (short of violating a release condition), appellant handled the problem "responsibly" (Tr. 24) by returning to the Hospital voluntarily, where he "did well" for a year. Despite his having done well as a voluntary patient he was denied a jury trial on the question whether he should be

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(fn. cont.)

Here the Hospital similarly deprived appellant of his liberty by refusing a transfer to less restrictive confinement, although was concededly a voluntary patient who unlike Darnell had not even been arrested for crime and returned to the Hospital by the authorities. As in Darnell, such actions "give serious credence to a charge that hospital authorities act lawlessly toward the mentally disabled." 121 U.S. App. D.C. at 60-61, 348 F.2d at 66-67.

confined in Saint Elizabeths indefinitely, although a raving psychotic who had maimed his family while under the influence of drugs or alcohol -- whether he was a former mental patient, a former criminal, or both -- would have had the benefit of a jury trial before being put away indefinitely.

Analytically, the only available justification for such discrimination is the fact that appellant was a conditional releasee. But the analysis is not capable of rational support. With no outstanding finding of commitability, in the face of a recent judicial finding of non-dangerousness, in the face of one year of successful life outside the institution pursuant to that finding (half of that year without need of treatment) and in the face of months of "doing well" upon his voluntary return, appellant was unlawfully discriminated against in being denied the right to have a jury of his peers decide whether or not he was so dangerous as to represent an intolerable risk among them.

II. UNLESS CONSTRUED TO REQUIRE A JURY TRIAL IN CONDITIONAL RELEASE REVOCATION CASES SUCH AS APPELLANT'S THE STATUTE WORKS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

The equal protection considerations relevant to this case have already been stated in Part I.C. of the Argument above, and what is there stated needs little expansion. The short and all but unanimous opinion of the Supreme Court in Baxstrom v. Herold, 383 U.S. 107 (1966),[1/] says all that there is to be said on the point. The Chief Justice's reasoning for the Court was on the most fundamental level: equal protection does not require that all persons be dealt with identically, but it does require that if one group is singled out for special treatment the distinctions have some relevance to the purpose for which the classification is made. In that case the classification marked off prisoners nearing the end of their penal terms from others; the disfavored class was not entitled to the jury review that others were entitled to before being civilly committed. The classification was lacking in reason, in relevance to its purpose, and was arbitrary, because there was no more reason to think the members

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1/ Mr. Justice Black concurred in the result. There was no dissent.

of the disfavored class mentally ill than non-members. Here, as we have shown above, the classification of appellant and others like him is arbitrary because there is, if anything, less reason to believe that they satisfy the standards for commitment than others. Appellant's prior criminal conduct is not a good enough reason for any substantial difference in the procedures and requirements for civil commitment, as Bolton held (p. 20, supra). And appellant's prior tenure in the Hospital is no adequate reason for such a difference when one considers the subsequent judgment, based on the Hospital's recommendation, that he could safely be released on conditions that, so far as appears, either had become needless or could have been reimposed.

It remains only to add that, as this Court recognized in both the Bolton and Matthews cases, equal protection safeguards inhere in the due process clause of the Fifth Amendment and so protect from arbitrary classifications those who are subject to federal law as well as those who are, like the petitioner in Baxstrom, subject to state law.

III. INVOLUNTARY CONFINEMENT IN SAINT ELIZABETHS HOSPITAL WITHOUT A JURY TRIAL TWO YEARS AFTER HIS CONDITIONAL RELEASE DEPRIVED APPELLANT OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW.

Equal protection considerations aside, revocation of appellant's conditional release without a jury trial, resulting in indefinite involuntary confinement solely for reasons of asserted dangerousness, deprived him of his liberty without due process of law.

The Supreme Court has erected significant due process barriers between psychiatric determination of dangerousness and indefinite involuntary confinement. Specht v. Patterson, 386 U.S. 605 (1967). Furthermore, at least since In re Gault, 387 U.S. 1 (1967), and Kent v. United States, 383 U.S. 541 (1966), it has been clear that the need for procedural due process arises not because a particular proceeding may be labeled civil or criminal, but because of the "tremendous consequences," Gault, supra at 30, quoting from Kent, flowing from whatever kind of proceeding is being considered. Accord, In re Winship, 397 U.S. 358 (1970).

This Court has earlier noted that involuntary Saint Elizabeths confinement raises substantial questions of due process, Matthews v. Hardy, _____ U.S. App. D.C. ____, 420 F.2d 607 (1969). Considerations of what process is due no doubt influenced the decisions in Darnell v. Cameron, 124 U.S. App. D.C. 58, 348 F.2d 64 (D.C. Cir. 1965) and Friend v. United States, 128 U.S. App. D.C. 323, 388 F.2d 579 (D.C. Cir. 1967), establishing the minimal procedure to be followed when it is sought to revoke conditional release.[1/] There must at least be a hearing by the court that originally granted release, a record must be made, and the decision must be based upon reasoned and reviewable findings and conclusions. It is from this point -- the right to a judicial hearing already having been recognized -- that the inquiry into appellant's request for jury trial upon due process grounds begins. Why is a jury trial so uniquely suited to the proper disposition of this class of cases that availability of a jury can be said to be among "the essentials of due process and fair treatment," Gault, supra at 30, required by the Constitution?

1/ In neither of the cited cases was there, apparently, a demand for a jury trial.

Two differences between juries and judges are critical to this inquiry. First, juries are likely to be more skeptical of psychiatric evidence and less easily swayed by expert testimony and by the fact that the government is the patient's adversary. The jury, as has frequently been said, represents the views of the community -- views that should be heard when dangerousness is being considered. Second, the jury context puts all parties on notice that the trial at hand is a serious matter, deserving of the fullest preparation, requiring adequate time on the trial calendar and demanding patient and deliberate conduct on the part of the judge. The jury is fairer, and the jury trial context is more conducive to fairness; both are needed to afford adequate protection.

A. The Jury Itself Affords The Citizen More Protection Than A Judge In This Type Of Proceeding.

In Duncan v. Louisiana, 391 U.S. 145, 156 (1968), the Supreme Court held that trial by jury is "fundamental" to our system of justice because it gives the accused

> an inestimable safeguard against the ... overzealous prosecutor and against the compliant, biased or eccentric judge.

This Court has already had occasion to point out that the Hospital's role in judicial commitment proceedings has been altogether too much that of the prosecutor -- and sometimes an overzealous one at that. In Dixon v. Jacobs, ____ U.S. App. D.C. ____, ____, 427 F.2d 589, 600-01 (D.C. Cir. 1970) the Court was moved to express its "sadness ... [at] the behavior of the hospital authorities ..., [who] made no effort to ventilate the issues for decision; [who, on the contrary,] attempt[ed] to avoid any review whatsoever of [their] action." The Hospital, this Court remonstrated, "bears a special responsibility for assuring that information regarding the patient's condition is fully presented to the District Court, and that the court understandingly considers the issues presented" (id.). The Hospital can, and will if permitted, "mislead" the District Court into summary and unfair rulings. Darnell v. Cameron, p. 29, n.1, supra. A jury trial is likely to help protect against such a danger.

No one could responsibly characterize the District Court as being peopled with compliant or biased judges. Nevertheless, it has been responsibly suggested that the District Court judges too readily heed the pronouncements of the Hospital experts in mental health proceedings.

During hearings on the constitutional rights of the mentally ill before the Subcommittee on Consitutional Rights of the Senate Committee on the Judiciary, the Chairman of the Mental Health Committee of the D.C. Bar Association, who had formerly been an Assistant United States Attorney, a district court judge's clerk, the legal assistant to the Commission on Mental Health, and then a private practitioner specializing for nine years in mental health proceedings, testified as follows:

> [Subcommittee Counsel]: [W]hen you mention the availability of jury trial, do you consider that a jury trial is more desirable for the patient than a hearing before a judge?
>
> [The Witness]: When you are speaking of rights ... I don't think you can compare a jury with a judge in that respect.
>
> Where you have a habeas corpus petition, if you were to change the law to give a person the right to a jury o[n] habeas corpus peition, I think I could clean out Saint Elizabeths Hospital, criminally insane and civilly, in just a matter of time.
>
> Juries pay very little attention, I find, to psychiatric expert testimony.
>
> [Counsel]: You mean the judge does?
>
> [Witness]: Indeed they do. In the District of Columbia the judges do.

We have a fine federal judiciary that hears habeas corpus petitions. The climate in the District has been pretty strong in cases like Dallas Williams and a few others where everyone is concerned about the public's safety. The deemphasis has been on the individual rights, and this is one of the reasons I am so pleased to see this Committee go into the field.

I fully agree that the public has to be protected, but where you have a statement of a doctor that a man is sick, and the man appears before the judge, he has a very substantial burden to overcome before the judge will consider releasing him. ... I think you could say without any difficulty that [the Superintendent] could keep any criminal patient, any patient committed as a result of finding of not guilty by reason of insanity in Saint Elizabeths as long as he wanted to.[1]

The foregoing observation regarding jury skepticism must be evaluated in the light of very suggestive findings from empirical studies of the behavior of juries in this country and in England. Significantly, studies on both sides of the Atlantic found juries less disposed than judges to accept the word of police witnesses. The English study is described in Cornish, The Jury 143 (1968), where it is stated:

1/ Hearings on the Constitutional Rights of the Mentally Ill Before The Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 87th Cong., 1st Sess. ser. 70065 at 62 (1961).

> [O]ne can only conclude that of the various aspects of the jury's function as a bulwark of liberty the most important today is its role in preventing police influence in the courts from becoming dominant. For this reason alone, it is desirable that independent laymen should continue to have some voice in deciding the outcome of serious criminal cases.

In the monumental The American Jury (Kalven and Zeisel (1966)), a similar jury willingness to question police practices and to respond negatively to official injustice is suggested in Chapter 23 (id. at 318). Although these studies focused on criminal matters, their findings at least suggest the possibility that, like a policeman, the government psychiatrist represents authority which, thinks the jury, needs careful watching, especially where, as here, a family fight can precipitate a chain of events leading to indefinite -- perhaps lifelong -- confinement.[1/]

Kalven and Zeisel also demonstrate that juries are more likely than judges to acquit upon reasonable doubt (id. at 187). Nowhere is this "show me" refusal on the part of a jury to rubber-stamp the government's desired

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1/ Compare Kalven and Zeisel, The American Jury, Ch. 18 at 258, wherein it is also noted that juries are reluctant to find against defendants when the degree of possible punishment appears to outweigh the asserted wrongdoing.

result more apposite than in the imprecise kind of prediction involved in forecasting future dangerousness. The whole community, not just a solitary judge, must live with an accused criminal or an assertedly dangerous lunatic. In this connection

> the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility which results from that group's determination....
>
> Williams v. Florida, 399 U.S. 78, 100 (1970) (emphasis added).

The following section, which discusses some unusual elements of the hearing below, lends credibility to the foregoing conclusions regarding the office of the jury.

B. In Addition To The Jury Itself, The Jury Trial Context Affords A Necessary Increment Of Protection.

The "mental hearing" below was the eleventh of fifteen "preliminary" matters scheduled before Judge Walsh on May 7, 1970; the other fourteen proceedings were criminal proceedings -- pleas, sentencing, motions, declaration of a mistrial pursuant to a hung jury -- involving eleven current criminal defendants and appellant. (Appellant's hearing was calendared as a criminal matter, although he had been acquitted more than eight years earlier.) That such a situation is not likely adequately to protect individual rights was recognized at

least seven years ago by many of the witnesses who testified on the Hospitalization of the Mentally Ill Act of 1964. The ACLU representative, for example, stated:

> I share the view expressed by Judge Holtzoff [in earlier testimony] that routine hearings before an already overloaded District Court would not be conducive to the careful preservation of individual rights. These rights are now secured ... under the right of jury trial where that is demanded.
>
> Hearings on S.935, supra, at 50.

The circumstances of the hearing below, some of which are described in what follows, bear out this view of the importance of a jury trial.

For example, the court below was understandably anxious to move through the morning's crowded docket at a brisk pace; apparently appellant's court-appointed counsel felt at least some pressure in this direction. He arrived at a point in his case (concerning appellant's periodic visits to the Hospital pursuant to the previously described release conditions) which he felt was critical. (Hospital records show that appellant made these visits regularly and showed significant progress: "things seem[ed] to

be going very well."[1/]) Counsel had a number of periodic Hospital progress reports marked for identification and attempted to use them during cross-examination of the government's psychiatric witness, in order to demonstrate appellant's compliance with all release conditions and his satisfactory adjustment while on release. The court, perhaps ultimately in response to the government's impatience regarding the number of such documents to be introduced (see Tr. 22), took occasion to note that this material was "not impressing the Court." Tr. 23. Such a comment, of course, would have been inappropriate in the presence of a jury; as the trier of fact it would have had the benefit of a full exposition of this highly probative material. But the comment was made in response to appellant's counsel's offer to shorten the procedings; it is reasonable to infer that the Court's desire that they be shortened was somehow communicated to counsel first.[2/]

1/ Official Hospital Record: "Visit Interview," September 9, 1968 (Appendix I, Item 8); see also Appendix I, Items 9-13 for similar visit reports.

2/ It is hard to know what to make of the final ten pages of the transcript (31-40), but it is not unreasonable to suggest that they reflect a degree of confusion, and to suggest further that at least some of this confusion may also have been due to judicial haste. On page 35 of the transcript, for example, with seven-eighths of the trial (fn. cont.)

The transcript also yields material which is illustrative of the kind of judge-versus-jury considerations discussed in the preceeding section. For example, after hearing counsel for appellant request for the third time a jury trial on the issue of termination of his client's liberty, (Tr. 35) the court responded as follows:

> I don't see -- actually, I don't see where you have any particular problem. If you can convince your client to comply with the rules and regulations of the hospital, you can rest assured that they will want him out of there as soon as they can. They are overcrowded. (Tr. at 36).

There is also evidence of the court's high regard for psychiatric testimony in the following:

> Now, when two doctors from St. Elizabeths [sic 1/] say that the person should remain in the hospital, actually, the Court doesn't see that he has any particular problems if he would take his medicine .... (Tr. at 35).

(fn. cont.)
behind it, the court apparently somewhat belatedly grasped the fact that appellant had been acquitted by reason of insanity at some point in the past, and that appellant's request for a jury trial was not for a trial of his guilt or innocence of pending criminal charges. Appellant can only speculate that at this point the court may have confused the "mental hearing" at which it was presiding with a hearing on the issue of competence to stand trial.

1/ Only one Saint Elizabeths doctor testified below.

And the Court's evident regard for government psychiatrists led it shortly thereafter to deliver (Tr. 37) a favorable biographical sketch of a doctor not involved in the hearing, but whose name had come up earlier in the proceedings. Appellant respectfully suggests that a jury might be expected to have come to a somewhat more objective decision than a judge whose stated biases are so unidirectional -- to say nothing of judicial predilections which perhaps more frequently go unarticulated.

Other relevant material never came out at the hearing below -- most of it was available from Hospital records. And appellant's concern here goes deeper than the Hospital's refusal to heed this Court's repeated invitations to establish adequate administrative and record-keeping procedures, Williams v. Robinson, ___ U.S. App. D.C. ___, ___ F.2d ___, slip op. at 9 (D.C. Cir. No. 23,763, June 19, 1970). Many actions that the doctors take, many statements that they make, and many actions or statements that they wrongfully omit, suggest either conscious manipulation of facts for improper purposes or an equally serious haphazard disregard for fundamental considerations of accuracy.

For example, when Dr. Pugh, the Saint Elizabeths doctor who testified below, recommended revocation of appellant's conditional release, he changed appellant's diagnosis to include drug addiction for the first time, apparently on the basis of appellant's admission that he had occasionally "snorted" heroin while on conditional release (Appendix I, Item 1). This then was used as a principal ground for recommending revocation of conditional release. Dr. Pugh also raised the specter of drugs at the revocation hearing (Tr. 25). But this did not prevent him, three days thereafter, from writing in appellant's offical Hospital record:

> He use[d] to be a heroin addict before 1962, but there has been no evidence of drug usage since that time.
> Appendix I, Item 7.

The latter entry was consistent with the testimony of appellant's doctor at his release hearing (Appendix II, page 8), and Dr. Pugh had at other times discounted appellant's admissions of criminal behavior (Appendix I, Item 1, para. 3).[1/]

1/ Dr. Pugh is the same doctor whose reliance on his own legal conclusions in the case of Williams v. Robinson, ___ U.S. App. D.C. ___, ___ F.2d ___ (D.C. Cir. No. 23,763, 1970) is noted in United States v. McNeil, ___ U.S. App. D.C. ___, ___ F.2d ___ (D.C. Cir No. 24,263, 1970) slip op. at n.55. Mr. Williams' official Hospital records indicate that there was a substantial period of time during which Dr. Pugh believed Mr. Williams not to be legally confinable, but during which Dr. Pugh took no action looking toward release. Appendix III.

Further, the testimony at the release hearing, Appendix II at 8, was that some sort of calming drug was required for appellant's mental illness, and that his earlier use of narcotics satisfied this need to control his problem. There was no suggestion of any crime committed by appellant in order to secure drugs, only of their use and occasional sale eight years before. Query whether past drug usage constituted a real threat of dangerousness to self or others in the revocation hearing context. But there was no discussion of any of this evidence of record during the mental hearing below.

The very release condition which led appellant to return to the Hospital turns out to have been based on an unsound foundation. From the outset appellant's parents appear to have denied any family involvement with mental illness beyond that of appellant (e.g., Appendix I, Items 14, 15). Despite this, a Hospital social worker had misgivings (Appendix I, Item 15), and stated that appellant's mother was the subject of "considerable tension" and that she would "probably need considerable support when the patient is ready to return to the community" (id.). When the time came to evaluate the home just prior to conditional release, however, a different social worker approved the parents'

home, stating "[o]ne must be impressed with parents who can successfully raise ten children and have only one of the ten stray from the socially acceptable behavior pattern." Appendix I, Item 16. There is nothing to suggest that appellant's mother got any -- must less "considerable" -- attention, upon his release, or that the latter social worker was even aware of the concerns of his predecessor.

Such was the genesis of the live-at-home release condition, despite additional evidence in appellant's hospital records which disclosed that appellant's father was a former mental patient (Tr. 17), and that a number of others in both his immediate and more remote families had had significant mental disturbances.[1/] This family background should have cast

1/ This evidence consisted of a handwritten letter to the Hospital authorities from appellant's brother, outlining at length and in detail his family's history of mental disorder. Counsel for appellant has read a copy of this letter in appellant's files at John Howard Pavilion on at least two separate occasions. When he tried to secure a copy of it, however, he was referred to Hospital headquarters. Their original copy of the files, it turned out, had been in the custody of the U.S. Attorney's office since April, 1970. Assistant U.S. Attorney John Terry, Esquire, very kindly located this file and made a full copy of its contents available for the use of counsel for appellant. This file did not contain the aforementioned letter, however,

severe doubt upon the wisdom of forcing appellant back into the family setting upon release. He was thirty years old at the time of the altercation; perhaps any thirty-year-old son would be expected to chafe under the close custody of his parents, especially if his mother is quite tense and he knows his father to have been mentally unsound himself. It is reasonable to suggest that this release condition may have harmed, rather than helped, appellant, his parents, and society. Such a possiblity, perhaps crucial to the revocation decision, never came to be explored below.

* * *

There is no need to delve deeper into the files for still additional disturbing material. Appellant sees little point in trying to assign all of

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(fn. cont.)
nor did it contain appellant's request to have his status clarified, nor Dr. Weickhardt's response describing the "revocation" of appellant's release (see pages 6-7, supra). Counsel for appellant reiterated his request for a copy of appellant's brother's letter to Hospital headquarters, and was told that he was not entitled to a copy of the letter because it came from outside the Hospital. He is now informed that the copy of this letter is no longer in the John Howard file; in any event, he regrets that he is unable to offer a copy of it to this Court.

the blame for such shortcomings to appointed counsel or to the court or to the Hospital (which does bear a heavy burden -- see page 37, supra). The point is that in the formal setting of a full-scale jury trial where counsel for both sides must prepare for the most substantial and significant proceedings provided by our law -- a jury trial where liberty is at stake, rather than a "mental hearing"-- and where enough time is allowed on the docket for a full and unbiased exploration of the issues, justice is more likely to be done.

This Court has properly insisted that in this regard "[t]he courts of the District of Columbia should not content themselves with enforcing the minimum standards which the Constitution requires. They should also set for the Nation an example of respect for the rights of citizens." Jones v. United States, 119 U.S. App. D.C. 284, 289, 342 F.2d 863, 868 (1964) (en banc) (plurality opinion), quoted in McNeil, supra, slip op. at 14, n.12 (Bazelon, C.J., concurring).

But the District does not lead the way in this area. Across the District line in Maryland, for example, an individual who is confined as dangerously insane has a right to a jury trial on the issue of his

right to release, even without a prior judicial finding of non-dangerousness (Ann. Code of Maryland, Art. 59 § 21). The same is true in Massachusetts (123 Ann. Laws of Mass. § 92), and in Colorado (Colo. Rev. Stat. § 21-1-13). In Texas, the applicable statute provided for a judicial hearing on the right to release without a jury (Vernon's Ann. Cir. St. Art. 5547-82(c)); it was held in Swinford v. Logue, 313 S.W.2d 547 (1958) that this provision violated the jury trial guarantee of the Texas Constitution. Quoting from an earlier Texas decision, the Court of Civil Appeals of Texas stated:

> The Constitution and laws of Texas jealously protect the liberties of the citizens of the commonwealth, and throw about each citizen, sane or insane, the safeguards of being heard ... before a jury of his countrymen. If the rights of any class of persons should be more closely and sacredly guarded than another, it is that unfortunate individual who, rightfully or wrongfully, is charged with having a mind diseased or a reason dethroned. The unfortunate or his friends have the right to insist upon compliance with every form prescribed by law, which has been enacted for the protection and preservation of his liberty.
>
> Id. at 550 (citation omitted).

This Court should say no less.

CONCLUSION

WHEREFORE the ruling below should be reversed and the case remanded to the court below with instructions that appellant be afforded a jury trial on the issue of the revocation of his conditional release.

/s/ Herbert M. Silverberg

Herbert M. Silverberg
Counsel for Appellant
(Appointed by this Court)

Of Counsel:

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Tel. No.: 293-3300 x421

APPENDIX I

Excerpts From Appellant's Official Hospital Files

FORM SEH-15 Rev. (4-63)

RETURN FROM CONVALESCENT OR AUTHORIZED LEAVE

1. TYPE OF LEAVE (CHECK ONE)
☒ CONVALESCENT ☐ UNAUTHORIZED ☐ TEMPORARY VISIT OR VACATION UNDER UNUSUAL CIRCUMSTANCES

2. DATE LEAVE STARTED: 10/4/67

3. DATE OF RETURN FROM LEAVE: 10/27/68

4. TIME OF RETURN: 12:00 MN M

5. CIRCUMSTANCES OF RETURN (TO BE COMPLETED BY NURSING PERSONNEL)

Mr. Wingfield returned voluntarily to the service (John Howard) and requested that he be allowed to sleep for the night. He stated that he had had a fight with his family, that he did not want to remain at home and that he did not have another place to sleep. A man called from outside who stated that he was Mr. W ngfields brother. He stated that Mr. Wingfields story of a fight with his family was correct and that Mr. Wingfield had struck his mother with a chair and injured his father's arm. He stated that the police had been called and that the police had advised Mr W.ngfield to get a cab and return to St. Elizabeths Hospital.

6. SIGNATURE AND TITLE OF NURSING EMPLOYEE: W.R.Ware, Sup. Psych. Nurse

7. DATE

8A. CIRCUMSTANCES OF RETURN (TO BE COMPLETED BY PHYSICIAN)

As above

B. PHYSICAL CONDITION: None

C. MENTAL CONDITION: None

D. TREATMENT: None

E. ADMINISTRATIVE ACTION (INCLUDE NOTIFICATIONS, IF ANY)

9. PHYSICIAN'S SIGNATURE: [signature] M.D.

10. DATE: 10/28/68

19. PATIENT IDENTIFICATION (USE PATIENT'S PLATE)
WINGFIELD, HOWARD 80,910
CP-NG 4-3-62 -40 CH

11. REVIEWED BY NURSE SUPERVISOR

12. DATE 10-28-68

13. REVIEWED BY PHYSICIAN IN CHARGE M.D.

14. DATE 10-28-68

15. REVIEWED BY CLINICAL DIRECTOR

16. DATE

17. OTHER REVIEW (WHERE APPROPRIATE)

18. DATE

DUPLICATE FOLDER FILE

FORM SEH-15 REV.

80,9[illegible]

Standard Form 507
(Revised August 1954)
Bureau of the Budget
Circular A-32

U.S. GOVERNMENT PRINTING OFFICE : 1961 O—587879

CLINICAL RECORD

Report on 507 Notes
or
Continuation of S. F. _____
(Strike out one line) (Specify type of examination or data)

(Sign and date)

November 4, 1969: Daniel D. Pugh, M.D., Chief, Treatment Service Branch
em RECOMMENDATION FOR REVOCATION OF CONDITIONAL RELEASE AND CHANGE OF DIAGNOSIS

Last week, Dr. Weichhardt informed me of the request by Mr. Wingfield's lawyer, Joel Forkosch, for a periodic medical reexamination of his client as required by the Bolton versus Harris, 395F. 2d242 (D.C. Cir 1968). In response to this request I have interviewed Mr. Wingfield brriefly last week and again today and have reviewed his case records. I feel that it would be appropriate in this note to review recent developments in Mr. Wingfield's case.

On December 1, 1967, Mr. Wingfield, who ~~is~~ was asymptomatic on a dosage of 450 milligrams daily of Thorazine, was placed on conditional release by the Court on condition that he live with his parents and continue to be under outpatient Hospital supervision. During the convalescent leave Mr. Wingfield's medicine was gradually reduced and was finally discontinued on April 13, 1968. Mr.

Mr. Wingfield returned to the Hospital voluntarily on October 27, 1968, stating that he had had an altercation with his father and that the police had been called. On the day following admission Mr. Wingfield changed his story and said that he was wanted for robbery. It became apparent that it was impossible to get a coherent story out of Mr. Wingfield as to what he had been doing on the outside and why he had come back. His general behavior was extremely hyperactive. He slept very little at night and spent most of the day pacing up and down the halls. Sometimes he actually ran up and down the halls. He did not relate to the other patients at all but he bothered the attendants repeatedly with the same requests and questions.

He was treated with very high doses of Thorazine which produced no amelioration, of his clinical condition. On testing his urine, it turned out that he was not taking the Thorazine at all even though he said he was. In late spring or early summer, Mr. Forkosch, Mr. Wingfield's attorney, visited the Hospital and asked me about Mr. Wingfield's legal status. I informed him that Mr. Wingfield was here as a voluntary patient even though he seemed to be somewhat ambivalent about whether he should be here or not. He would repeatedly request, both in words and in writing, to be released from the Hospital, but when I told him that I thought it would be best for him to stay here he would always agree to stay. I explained to Mr. Forkosch that I had never requested revocation of the conditional release because I had always maintained hopes that Mr. Wingfield's psychosis could be gotten into remission fairly promptly and it would merely mean two months of haggling with the court if the conditional release were revoked at that time. Mr. Forkosch agreed that it would be best not to officially request the revocation of the release and

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U.S. GOVERNMENT PRINTING OFFICE : 1961 O—587879

CLINICAL RECORD

Report on _____
or
Continuation of S. F. 507 Notes - 2
(Strike out one line) (Specify type of examination or data)

(Sign and date)

he said he would check back in a month to see if Mr. Wingfield was improving any. At the time of his visit, Mr. Wingfield had shown some mild improvement of about two weeks duration.

Mr. Wingfield's improved condition turned out to be stable and in midsummer when the means of his medication administration was changed in such a way as to give him his Thorazine at the same time as he took his Kemadrine, he improved still more and for the first time there was evidence of substantial amounts of Thorazine in his urine. From this time forth it appeared that Mr. Wingfield was taking about half of the Thorazine he was given. He was given 600 milligrams daily together with one milli[illegible] of Prolixin Enanthate every fourteen days. On September 21, he was transferred to Ward 7, a privileged ward, and he has done quite well there. His physical overactivity has been limited to pacing but the pacing has lost the furious quality that it use to have. He interacts with other patients at present and is cooperative with ward routines. He denies ever having heard voices or having any delusion-like ideas. At present his principle symptomatology consists of a chronic, inappropriate euphoria and of his marked ambivalance and lack of insight. In the course of a single conversation, it becomes apparent that Mr. Wingfield both wants out of the Hospital and does not want out of the Hospital; both wants to take his medicine and does not want to take his medicine; both believes he is taking his medicine and believes that he is not taking his medicine; and both believes that he is sick and believes that he is not sick.

On reviewing his drug problem, Mr. Wingfield states at present that he began using heroin in 1960. He sometimes snorted it and sometimes took it by needle but he always took it only about two caps at a time and only on weekends. He denies ever having had a psychological addiction. He denies ever having sold drugs for profit although he says that he occasionally directed people to drug dealers or even acted as a middle man out of a spirit of charitableness. He says that it was such a charitable transaction that led to his arrest for narcotics sale. He denies having had any significant involvement with drugs other than heroin or with alcohol. He does not believe that the heroin "messes up my mind."

He does admit that during his recent convalescent leave he did return to the use of heroin in small amounts by inhalation only.

In conclusion, it is my belief that Mr. Wingfield is still suffering from catatonic schizophrenia, although this time he is exhibiting the excited phase of the illness. He is also still suffering from drug dependence and

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)
WINGFIELD, Howard
SAINT ELIZABETHS HOSPITAL

REGISTER NO. 80,910
WARD NO. JHD

REPORT ON _____ or CONTINUATION OF 507 Notes-2

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80

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U.S. GOVERNMENT PRINTING OFFICE : 1961 O—567679

CLINICAL RECORD

Report on _____
or
Continuation of S. F. 507 Notes - 3
(Strike out one line) (Specify type of examination or data)

(Sign and date)

would probably return to the use of narcotics if he had access to them. He appears to have no insight concerning his illness or the necessary treatment thereof and I believe that he will need to remain under Hospital supervision for the foreseeable future.

It is therefore my opinion that Mr. Wingfield is mentally ill and would be dangerous if released from the Hospital and inview of the clear possibility of legal action being initiated by his attorney, I feel that we should cover outselves at this time by formally requesting that the Court revoke his conditional release which was granted on December 1, 1967.

DIAGNOSIS: 295.20 SCHIZOPHRENIA, CATATONIC TYPE.

CHANGE TO: 295.20 SCHIZOPHRENIA, CATATONIC TYPE.
304.00 DRUG DEPENDENCE, OPIUM, OPIUM ALKALOIDS AND THEIR DERIVATIVES.

RECOMMENDATION: REVOCATION OF CONDITIONAL RELEASE.

W. Pugh
Chief, Treatment Service Branch

Elaine D Weickhardt
Acting Clinical Director

Superintendent

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

WINGFIELD, Howard
SAINT ELIZABETHS HOSPITAL

REGISTER NO. 80,910 | WARD NO. JHD

REPORT ON _____ or CONTINUATION OF 507 Notes-3

Standard Form 507
507-104

Dr. Deorge D. Weckhart

I was on conditional release I came back to John Howard pavilion St Elizabeth Hospital on our free will my father me have a disagreement and he call the police and I would like to know if my conditional release is still good.

Howard Wengfield

OCT 24 1969

JH/GDW

November 4, 1969

Mr. Howard Wingfield
Saint Elizabeths Hospital
John Howard Division
Washington, D. C. 20032

Dear Mr. Wingfield:

In response to your letter, we thought it would be best to revoke your conditional release at this time.

Sincerely yours,

George D. Weickhardt, M.D.
Acting Clinical Director
John Howard Division

GDWeickhardt/em
cc: Record Room
Dupe. File

see reply dated 11-4-69

LEGAL AID AGENCY
FOR THE DISTRICT OF COLUMBIA
COURTS BUILDING
310 SIXTH STREET, N. W.
WASHINGTON, D. C. 20001
TELEPHONE (202) 629-5179

BARBARA ALLEN BOWMAN
DIRECTOR
629-5021
NORMAN LEFSTEIN
DEPUTY DIRECTOR
629-5021

September 22, 1969

Dr. George D. Weickhardt
Chief of Service
John Howard Pavilion
Saint Elizabeths Hospital
Washington, D.C. 20032

RE: Howard Wingfield; Criminal No. 1104-60

Dear Dr. Weickhardt:

Howard Wingfield is presently confined at Saint Elizabeths Hospital (John Howard Pavilion) pursuant to a verdict rendered on April 4, 1962 of not guilty by reason of insanity in the above-referenced criminal proceeding. He was represented at trial by Mr. Whitsett of the Legal Aid Agency. Mr. Whitsett is no longer with the Agency and the case has come to my attention because of the length of Mr. Wingfield's confinement sans any indication in the record that the legally mandated review procedures required by Bolton v. Harris, 395 F.2d 242 (D.C.Cir.1968), have been sought or granted.

I am therefore now formally requesting that a current examination be made of Mr. Wingfield's mental condition and that I be furnished copies of the reports of the physicians who participate in the examination and of your findings and conclusions with respect to Mr. Smith's mental condition and dangerousness.

Page Two

Because of the great length of time that Mr. Smith has been at Saint Elizabeths, I would request that this examination be expedited.

Very truly yours,

Joel A. Forkosch

JOEL A. FORKOSCH
Staff Attorney

JAF:bt

cc: Mr. Howard Wingfield
John Howard Pavilion
Saint Elizabeths Hospital
Washington, D.C. 20032

LEGAL AID AGENCY
FOR THE DISTRICT OF COLUMBIA
COURTS BUILDING
310 SIXTH STREET, N. W.
WASHINGTON, D. C. 20001
TELEPHONE (202) 629-5179

BARBARA ALLEN BOWMAN
DIRECTOR
629-5021
NORMAN LEFSTEIN
DEPUTY DIRECTOR
629-5021

October 29, 1969

Dr. Louis Jacobs
Superintendent
Saint Elizabeths Hospital
Washington, D.C. 20032

Re: Howard Wingfield
Criminal No. 1104-60

Dear Dr. Jacobs:

Howard Wingfield is presently confined at Saint Elizabeths Hospital (John Howard Pavilion), pursuant to 24 D.C.C., Section 301(d), after a verdict rendered on April 4, 1962 of not guilty by reason of insanity in the above-referenced criminal proceeding. He was represented at trial by Mr. Whitsett of the Legal Aid Agency. Mr. Whitsett is no longer with the Agency and the case has been reassigned to me.

On September 22, 1969 I wrote to Dr. George D. Weickhardt, Chief of Service at John Howard, requesting that the procedures imported into 24 D.C.C., Section 301(e) by Bolton v. Harris, 395 F.2d 642 (D.C. Cir., 1968), be carried out with respect to Mr. Wingfield. (A copy of that letter is attached hereto). To date I have received no response of any form from Dr. Weickhardt.

Under these circumstances, particularly the length of Mr. Wingfield's confinement, and in order to exhaust Mr. Wingfield's administrative remedies, see Bolton v. Harris, Supra at 653, n.59, I demand at this time a full section 301(e) evaluation of Mr. Wingfield. I expect to receive, by return mail, a full statement from the Hospital setting forth when this evaluation will be conducted; how long it can be expected to take, and who on the staff will participate. In connection with this

last point, I am also requesting by letter of this date, a copy of which is attached, that an independent psychiatrist be appointed to participate in the examination of Mr. Wingfield.

If I am not immediately apprised of the steps to be taken by the Hospital to comply with the aforementioned clearly mandated legal procedures, or if the steps to be taken are delayed (Mr. Wingfield has been confined at the Hospital for almost eight (8) years), I shall file a petition in the District Court for a writ of habeas corpus on the grounds that Mr. Wingfield has no presently available and effective administrative remedies to be exhausted.

Finally, in a conversation with Dr. Pugh in July, 1969, I learned that Mr. Wingfield had been released conditionally in November, 1967, but returned to the Hospital late in 1968. Mr. Wingfield's present status is unclear, but if he is still technically on conditional release and is permitted to leave voluntarily, I will of course not seek to pursue the Batten remedies.

I await your early reply.

Very truly yours,

Joel A. Forkosch

Joel A. Forkosch,
Staff Attorney

JAF
tbw

c c: Dr. John D. Shultz
Mr. Howard Wingfield

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CLINICAL RECORD

Report on 507 Notes
or
Continuation of S. F. _____
(Strike out one line) (Specify type of examination or data)

S.K

(Sign and date)

May 10, 1970: Daniel D. Pugh, M.D., Supervisory Medical Officer (Psychiatry)
em

RECOMMENDATION FOR TRANSFER TO CRUVANT-B

Mr.. Wingfield has been doing very well on Ward-1, a privileged ward, since January 1970. From then until now, the major impediment to an off-service transfer in his case, has been the fact that the court had not revoked his previously granted conditional release. However, last Thursday, the conditional release was finally revoked and I therefore feel that Mr. Wingfield is now eligible for an off-service transfer.

He is suffering from schizophrenia which manifests as profound over-activity, over-talkativeness, and inability to take care of himself when he is not getting enough medicine. He has not been assaultive or belligerent for many years. He use to be a heroin addict before 1962, but there has been no evidence of drug usage since that time.

The principle management difficulty in Mr. Wingfield's case is his reluctance to take medicine as prescribed. He always says that he will take the medicine and he swallows it down, but urine testing reveals that under his present regiman, he only keeps down about half of the medicine that he is given, and therefore for over a year I have been giving him twice as much medicine as he needs. He is presently getting Prolixin Enanthate, 1 milliliter (25 mg) intramuscularly every fourteen days, Kemadrin 2.5 mg t.i.d. p.c., and Thorazine, 400 mg t.i.d. p.c. Under this regiman, if Mr. Wingfield spits up his Thorazine, he is also spitting up his Kemadrin and his meal.

While out on conditional release, Mr. Wingfield worked steadily and it is anticipated that he should be able to obtain and hold a job fairly soon. In my opinion, the major obstacle toward his living at home on conditional release again will be his reluctance to take medication, and I would recommend that a great deal of attention be focused on this problem both with Mr. Wingfield and with his family. It is essential in the management of Mr. Wingfield's case that his urine be tested from time to time with FPN reagent to make sure just how much medicine he is really getting.

I have discussed this case with Dr. Naifeh and he has agreed to take Mr. Wingfield as a transfer on Cruvant-B. Cruvant-D would also be an acceptable ward for Mr. Wingfield.

DIAGNOSIS: 295.00 SCHIZOPHRENIA.

RECOMMENDATION: TRANSFER TO CRUVANT-B.

Consider increasing
patient + reducing P.O. Thorazine.

Elizabeth Snezinsky
Acting Associate Director for
Forensic Programs

D. Pugh
(Continue on Supervisory Medical Officer (Psychiatry)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

WINGFIELD, Howard
SAINT ELIZABETHS HOSPITAL

REGISTER NO.	WARD NO.
80,910	JHD

REPORT ON _____ or CONTINUATION OF 507 Notes

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U.S. GOVERNMENT PRINTING OFFICE 1961 O—587I

CLINICAL RECORD

Report on _____
or
Continuation of S. F. 507 Notes
(Strike out one line) (Specify type of examination or data)

(Sign and date)

September 9, 1968: Dr. William M. Lee - Medical Officer (General Practice)
hsl

VISIT INTERVIEW

Mr. Wingfield kept his appointment today and was both on time and neatly dressed. He conversed easily and acted appropriately, although his affect was somewhat labile and his mood giggly. He says that he is now employed six days a week at the Chestnut Hill Apartments in Maryland, where he has been since June of this year. He claims that he is well liked out there, that he enjoys his work, that he has received one 10 cent an hour raise to a $1.70 now, so that his total take home pay per week is in the $70 range. Of this, he gives about $25 per week to his parents. He says that they are getting on in years, although they are both still working, and he feels the need to help out with his support and to try to make things easier for them. He is dating on occasion but has no immediate marital plans and is still on no medication. He is still living with his parents on 30th Street SE., and continues to be well motivated to stay out of trouble and to stay out of the hospital. He says that he feels much better off of the Thorazine and wishes to remain off of it. In short, things seem to be going very well.

William M. Lee
Medical Officer (General Practice)

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)
WINGFIELD Howard

Saint Elizabeths Hospital

REGISTER NO. 80,910

WARD NO. JHD

REPORT ON _____ or CONTINUATION OF 507 Notes

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* U.S. GOVERNMENT PRINTING OFFICE : 1961 O—587879 80,910

CLINICAL RECORD

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(Strike out one line) (Specify type of examination or data)

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Page 1

(Sign and date)

Dr. George D. Waickhardt, M.D.
Medical Officer (Psychiatry)

January 4, 1968

Mr. Wingfield came in to see me today accompanied by his father. He appeared well dressed, well nourished and happy. He is waiting to enter a vocational rehabilitation program.

His thorazine was today reduced to 300mg. daily.

George D. Waickhardt
Medical Officer (Psychiatry)

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)
WINGFIELD, HOWARD

REGISTER NO. 80,910

WARD NO. JHD

REPORT ON 507 or CONTINUATION OF _____
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CLINICAL RECORD

Report on 507 Notes
or
Continuation of S. F. _____
(Strike out one line) (Specify type of examination or data)

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Page 1

(Sign and date)

January 9, 1968: Mr. Ernest M. Reshow - Coordinator of Rehabilitation
wc Mr. Scott of the United States Employment Service informed me that Mr. Wingfield showed up for an interview, and was scheduled to take the General Aptitude Test Battery this week. Mr. Scott will keep me informed as to Mr. Wingfield's progress.

Ernest M. Reshow
Coordinator of Rehabilitation

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

WINGFIELD HOWARD

REGISTER NO. 80,910

WARD NO. JHD

REPORT ON 507 Note or CONTINUATION OF _____

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Saint Elizabeths Hospital

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CLINICAL RECORD

Report on 507 Visiting Note
or
Continuation of S. F. _____
(Strike out one line) (Specify type of examination or data)

ITEM 11
Page 1

(Sign and date)

February 1, 1968: Dr. George D. Weickhardt - Medical Officer (Psychiatry)
WC Mr. Wingfield came in today accompanied by his father. He reported that he has been working since January 15, as a stock room helper at Georgetown University. He earns $1.50 an hour. He rides the bus to and from work.

I reduced his thorazine to 200mg. daily.

George E. Weickhardt
Medical Officer (Psychiatry)

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

WINGFIELD HOWARD

REGISTER NO. 80,910

WARD NO. JHD

REPORT ON 507 Visiting Note or CONTINUATION OF _____

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(Revised August 1951)
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CLINICAL RECORD

Report on 507 Notes
or
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(Strike out one line) (Specify type of examination or data

ITEM 12
Page 1

(Sign and date)

March 7, 1968: Dr. George D. Waickhardt - Medical Officer (Psychiatry)
WC Mr. Wingfield was late but kept his appointment with me on the right day. He says he was fired from his job at Georgetown University because on pay day he went out to get his check cashed and stayed away from the job too long.

Thorazine was cut to 100mg. daily.

George D. Waickhardt
Medical Officer (Psychiatry)

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

WINGFIELD HOWARD

SAINT ELIZABETHS HOSPITAL

REGISTER NO. 80,910

WARD NO. JHD

REPORT ON 507 Notes or CONTINUATION OF _____

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* U.S. GOVERNMENT PRINTING OFFICE 1961 O—587879

CLINICAL RECORD

Report on _____
or
Continuation of S. F. 507 Notes
(Strike out one line) (Specify type of examination or data)

ITEM 13
Page 1

(Sign and date)

April 13, 1968: Dr. George D. Weickhardt - Medical Officer (Psychiatry)
jmw VISIT INTERVIEW

Mr. Wingfield kept his appointment with me today. Since March 15, 1968, he has been working as a caretaker on the grounds of the Flower Branch Apartments in Silver Spring, Maryland. He works 40 hours a week and his take-home pay is $58. In addition, he gets bus fare.

He is still living at home. Things there appear to be going well. At present his brother is home from Vietnam on 30 days' leave.

Medication was discontinued.

George D. Weickhardt
Medical Officer (Psychiatry)

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)
WINGFIELD Howard

Saint Elizabeths Hospital

REGISTER NO. 80,910

WARD NO. JH

REPORT ON _____ or CONTINUATION OF 507 Notes

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U.S. GOVERNMENT PRINTING OFFICE: 1959 O—510497

CLINICAL RECORD

Report on INFORMATION
or
Continuation of S. F. _____
(Strike out one line) (Specify type of examination or data

(Sign and date) Dr. James L. Read
(Medical Officer-Psychiatry)-MR
January 21, 1961

Informants: Mr. Robert Wingfield)
&) Parents
Mrs. Elsie Thomas Wingfield)

The patient's father is a 47-year-old colored gentleman employed as a laborer by the District Sanitation Department. He lets his wife do most of the talking and sprawls back completely relaxed in his chair gazing dreamily at the ceiling. The patient's mother is a well-dressed, neatly attired lady who is rather cautious and guarded in her statements about the patient. She is age 46 and is employed at what sounds like the Alston Hall which she states is a "home and school for little orphan children and I take care of them." In general not too much information is forthcoming from the parents and they appear quite relieved when the interview is over.

FAMILY HISTORY:

No attempt is made to get the parents to talk about themselves or their own personalities. They both state they are in good health and both of them deny any familial illnesses or psychiatric familial determinants. The patient is the fourth of ten children. They have six boys and four girls and according to them all of their children are fine, healthy, normal Americans with the exception of the patient. One of their daughters, a few years ago when she was 16, had a "seizure" but has had no difficulties with this since and their description of this "seizure" is rather vague.

PAST HISTORY:

The patient was born on July 31, 1939. According to the mother his gestation birth and early development were fairly much within normal limits. However, he was slower in speaking than the rest of the children and they estimate he said his first word around age 16 months. He began walking around age 13 months and they state he held his head up and responded to them and sat up at the usual ages. According to the mother, after age 16 months he got "real slim and he stayed that way all his life."

As a child, the father comments, "He wasn't as active as I like my boys to

(Continue on reverse side)

CLINICAL RECORD

Report on _____
or
Continuation of S. F. 507 Psychiatric Case Study 2
(Strike out one line) (Specify type of examination or data)

(Sign and date)

Speech: He utters hardly a word, but when he speaks it is in a soft gentle barely audible voice and most of his communication is by rolling his eyes or moving his head about. About the only thing that emerges is that he does worry about his family but he can not elaborate on this.

Emotional Reaction: Affect is one of a so-called stupor.

Abnormal Mental Content: Questioned if he hears people talking when it doesn't seem as if anyone is around, he nods agreement, and also nods agreement when asked if perhaps bad or unpleasant things are being talked about. Otherwise, questions put to him regarding hallucinatory or delusional material are simply not answered.

Mental Grasp and Capacity: At this time the patient is just about untestabl for these aspects of the mental examination.

Medical Officer-Psychiatry

(Continue on reverse side)

Standard Form 507
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80,910

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CLINICAL RECORD

Report on _____
or
Continuation of S. F. 507 Notes
(Strike out one line) (Specify type of examination or data)

ITEM 15
Page 1

(Sign and date)

June 1, 1962: Social Service Branch — Laura Wiltz

A home visit was made to the patient's mother, Mrs. Essie Wingfield, 2728 - 30th Street, N. E., telephone LAwrence 6.3179. On April 13, 1962, I made this visit for the purpose of getting some clearer picture of the family feeling toward our patient as well as some clearer picture of the family personalities involved. Similarly, I hoped to be able to clarify the patient's new status here at the hospital. The interview, however, turned out to center largely about this latter factor.

The Wingfields live in a middle class neighborhood in a corner house which is substantially below par for that neighborhood. The interior of the house is inexpensively though well furnished and immaculately kept. Mrs. Wingfield is obviously very poorly educated and though very retiring in interview situation, she did appear to be quite alert.

A greater portion of the interview was spent explaining to Mrs. Wingfield the meaning of not guilty by reason of insanity and the usual course of rehabilitation as it occurs in the hospital. She is most anxious to have the patient visit, if not on an extended basis, on weekends as soon as possible. The procedure involved here and the fact that her son still remains in Maximum Security Division was explained to her and apparently accepted. She was hesitant about talking about the rest of the family, though she did indicate some pride in the achievements of her other children, such as finishing high school, completing nursing training, etc. She was likewise, very evasive about her husband and his activities at the present time. From this I gleaned and even mentioned to her that the family's mental health situation had obviously put her under considerable strain. She agreed to this quite readily, but did not seem disposed to elaborating on her feeling in this area. She did mention that her religious convictions were most important to her and have been most important to her in the stresses of both her son's and her husband's respective illnesses. I got the impression that considerable tension has and is mounting in Mrs. Wingfield and that she will probably need considerable support when the patient is ready to return to the community. I did not get the feeling that she had any special understanding of mental illness where her husband was concerned, much less where her son was concerned. However, she seemed to be quite tolerant in the instance of her husband's abated earning capacity and probably fluctuating behavior. It is my suspicion that the same type of tolerance will carry over to the son at such time when he begins again to live with his family.

(Continue on reverse side)

Laura Wiltz
Psychiatric Social Worker

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

WINGFIELD, Howard

Saint Elizabeths Hospital

REGISTER NO. 80,910 | WARD NO. J H P

REPORT ON _____ or CONTINUATION OF _____

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GPO: 643-16-77702-1

#80,910

CLINICAL RECORD

Report on _____
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(Strike out one line) (Specify type of examination or data

ITEM 16
Page 1

(Sign and date)

September 5, 1967:
bjb

Social Service Branch
COMMUNITY PLACEMENT EVALUATION

William H. Thomas

Referral:

This case was received in Social Service from Dr. Weickhard on 8/21/67 for the purpose of conducting a visit to the home of the patient's parents antecedent to his Convalescent Leave.

Patient:

Mr. Howard Wingfield was initially admitted to John Howard Pavilion on January 13, 1961. He was transferred to a minimum security service, West Side Service, on 2/15/62, where he remained until 4/3/62, and at that time returned to John Howard Pavilion. As of 3/21/67, patient was diagnosed Schizophrenic Reaction. He was admitted to the hospital with a charge of Violation of Federal Narcotics Law, for which he was determined to be not guilty by reason of insanity.

Community Evaluation:

A home visit was made to the home of patient's parents at 2728 30th Street, N. E. (526-3179) on 8/31/67. The house, which is a two story one tha is extremely well maintained and is located in a middle-class residential area, contain 3 bedrooms on the second floor, one of which will be used by patient. The house is tastefully decorated, spotlessly maintained, and adequately furnished. Patient will be residing in the home of his parents and these three persons will be the sole occupants.

Patient's father is Mr. Robert Wingfield, age 54, who is a laborer with the District of Columbia Sanitation Department. Mr. Wingfield conveys an impression of a strong, independent person who possesses a good sense of humor. He als impresses as being a very responsible person who will provide patient with as much help as is necessary as long as patient is properly motivated and exhibits this motivation b positive action. Patient's mother is Mrs. Essie Wingfield, age 53, who works 3 days pe week as a laundry helper. Mrs. Wingfield is rather quiet, quite congenial, and appears be a bit older than her stated age of 53; this is probably due to the fact that she is completely gray. She conveyed the impression of being the sweet, grandmotherly type wh would find it difficult to say no or turn down any requests made to her by anyone she loved. Both parents appear to be responsible and genuinely concerned and interested in playing a part in helping patient return to the community on a permanent basis. Parent advised that they would provide support, encouragement and reassurance along with a goo deal of understanding as part of their efforts to assist their son in his readjustment. They both advised that he can stay with them as long as is necessary until he becomes financially independent. They will supervise his regular taking of medication and sho he begin exhibiting some type of aggressive behavior, they would immediately contact t hospital.

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Standard Form 507
(Revised August 1951)
Bureau of the Budget
Circular A-32

O.K. P.R.

GPO: e42-16-77702-1

#80,910

CLINICAL RECORD

Report on _____
or
Continuation of S. F. 507 Notes - 2
(Strike out one line) (Specify type of examination or data)

ITEM 16
Page 2

(Sign and date)

Mr. Wingfield was a bit concerned about employment for his son, who has in the past worked at National Airport and at St. Johns High School as a kitchen helper. He was advised that should his son wish to continue along this line of employment, he should have very little difficulty in obtaining same.

Impression:

It is this worker's feeling that this patient's parents would provide him with a proper encouragement, support and guidance that he will need i the home should he go on Convalescent Leave status. The physical facilities of the prospective placement itself leave absolutely nothing to be desired. One must be impressed with parents who can successfully raise ten children and have only one of the t stray from the socially acceptable behavior pattern. Convalescent Leave to the parent's home is recommended.

William H. Thomas
Psychiatric Social Worker

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

WINGFIELD, Howard

Saint Elizabeths Hospital

REGISTER NO. 80,910

WARD NO. JOHN HOWARD

REPORT ON _____ or CONTINUATION OF 507 Notes-

Standard Form 507
507-104

APPENDIX II

Transcript of Conditional Release Hearing -- December 1, 1967 (Corcoran, D. J.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA

V.

HOWARD WINGFIELD

CRIMINAL ACTION

NO. 1104-60

TRANSCRIPT OF PROCEEDINGS

WASHINGTON, D. C.

DATE: December 1, 1967

VOLUME NO.

PAGES: 1 - 10

PREPARED FOR: THE DEFENDANT

ELAINE O. WELLS
OFFICIAL COURT REPORTER
UNITED STATES COURT HOUSE
WASHINGTON, D. C. 20001

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL ACTION
	:	
HOWARD WINGFIELD	:	NO. 1104-60

Washington, D. C.

Friday, December 1, 1967

The above-entitled cause came on for hearing before THE HONORABLE HOWARD F. CORCORAN, United States District Judge, at approximately 11:20 a.m.

APPEARANCES:

SCOTT R. SCHOENFELD, ESQUIRE, Asst. U. S. Attorney

For the Government

JON FELDMAN, ESQUIRE

For the Defendant

C O N T E N T S

P R O C E E D I N G S

THE DEPUTY CLERK: Criminal Case No. 1104-60, Howard Wingfield, defendant, Mr. Schoenfeld, for the Government and Mr. Feldman for the defendant.

MR. SCHOENFELD: Your Honor, readyfor this case.

THE COURT: Are you handling Wingfield?

MR. SCHOENFELD: Yes, Your Honor.

I will call the doctor.

Whereupon

GEORGE WEICKHARDT

was called as a witness by the Government and having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHOENFELD:

Q Doctor, would you please state your name and your position?

A George Weickhardt. I am a physician on the staff of Saint Elizabeths Hospital.

Q Doctor, in the course of your duties have you come into contact with Mr. Howard Wingfield?

A Yes, I have.

Q Has he been under your care and treatment?

A Yes, for approximately two and a half years.

Q Now how frequent has your contact been with him during that time?

A. Oh, I see him about once a week.

Q. What was the occasion for his being under your care and supervision in the first place?

A. He was found not guilty by reason of insanity on a narcotics charge.

Q. When was that, if you know?

A. That was in 1962.

Q. What was his diagnosis at that time?

A. Schizophrenic reaction catatonic type.

Q. Has he been in the hospital for the entire period since then?

A. Yes, he has.

Q. Now, Doctor, are you familiar with the care and treatment that he has received throughout that period?

A. Yes, I am.

Q. Are you familiar with his hospital records?

A. Yes, I am.

Q. Could you indicate what care and what treatment he has received during that period?

A. He has received among other things a drug called Thorazine and he is still receiving Thorazine.

He has also been in occupational theraphy and in group therapy.

Q. And have these different treatments been in effect throughout the entire time or part of the time?

A The occupational therapy was something that started more recently than the other treatment.

Q All right.

Are you familiar also with his family background?

A Yes, I am.

Q Does he have any members of his family living in the vicinity of Washington?

A Yes, he does.

Q Who?

A His mother, his father, and I believe there is a sister and a brother.

Q Now what is his present condition?

A He has an illnes of psychotic proportions which is now held in a state of remission by the fact that he is getting Thorazine.

He has improved a great deal while he is in the hospital but his improvement is dependent upon the medicine that he is taking.

Q Now have you formed an opinion as to whether he is dangerous to himself or others or will be in the reasonable future?

A It is my opinion that if he is permitted to leave the hospital under the conditions that we have proposed that he would not be a danger to himself or others.

Q And what are the plans for his release as far as you

formulated them at this point?

A. It is our proposal that he would live with his parents. Their address is 2728 Thirtieth Street, Northeast.

And I might say that we have had an investigation by our social service and had a very favorable report.

The second proposal is that he continue to take his prescribed medicine under the supervision of his father, that he would return to the hospital periodically as directed accompanied by his father and that he would seek some sort of employment or be in a vocational rehabilitation program under the direction of our director of vocational rehabilitation.

Q. Are you acquainted with his father in whose custody you suggest that he be placed?

A. Yes, I am.

Q. How long have you been acquainted with him?

A. His father has been in to see me several times in the past two years.

I have also talked to him on the phone a number of times.

Q. Has he been cooperative in this regard?

A. Yes, I would say that his family has always been entirely cooperative in everything that I have proposed.

Q. Doctor, who would administer the medicine that the defendant would continue to receive?

A. It would have to be administered daily by a member

of his family and I have suggested that it be his father. It would be in the form of capsules. It would be necessary for his father to see that he took the prescribed amount each day and he could take it once a day.

Q Has his father indicated willingness to take on that task?

A Yes, he has.

Q What would be the result if the medication was discontinued?

A He becomes excitable when the medicine is discontinued and I think it is extremely important that he continue to take the medicine.

Q Do you have any confidence that under the arrangements that you set up that he would be able to continue to receive medicine on a daily basis?

A I think that he would, yes.

MR. SCHOENFELD: May I have Your Honor's indulgence?

THECOURT: Yes.

MR. SCHOENFELD: Your Honor, I don't think I have any further questions.

CROSS-EXAMINATION

BY MR. FELDMAN:

Q I just have one or two questions, Doctor.

This would be the next logical step in the rehabilitation of this patient, would it not?

A. Yes, it would.

Q. And you are satisfied that any deviation from the program would be brought to your attention by members of his family, particularly his father?

A. Yes, I am confident that if they had problems with him at home that they would let me know about it and that we would be able to deal with such problems.

Q. You are satisfied that he is not a danger to himself or to others in the community when complying with conditions of your program?

A. That is my opinion.

Q. Thank you.

THE COURT: Doctor, I notice he was originally arrested on a narcotics charge.

Is he an addict?

THE WITNESS: He was at one time, Your Honor.

THE COURT: Do you feel that he has it under control now?

THE WITNESS: He has not had drugs for a number of years. I feel that one of the reasons he became involved with drugs in the first place is that he had a mental illness which required some sort of a tranquillizer and he found that in narcotic drugs.

THE COURT: But at the time he was arrested was he selling in order to get drugs, buying or selling in order to

get drugs for himself or was he a pusher?

THE WITNESS: He was trying to get drugs for himself.

THE COURT: He was an addict at that time?

THE WITNESS: Yes.

THE COURT: You don't feel that if he gets out from under your care at the hospital that he will slip back to his addiction?

THE WITNESS: I feel, Your Honor, that the medicine that he is now getting may very well be a substitute for the effect that he got fromnarcotic drugs.

Of course I can't be certain that he won't use narcotics again but I think that his family has a considerable influence over him and I think that we will never know just how well he can get along in the community unless we give him a chance.

THE COURT: How old is he, Doctor?

THE WITNESS: He was born in 1939.

THE COURT: Do you know anything about his employment record?

THE WITNESS: Mr. Wingfield doesn't have a great many occupational skills but he has been sticking to his occupational therapy in the hospital.

I feel certain that he is going to need a lot of help in getting employment but I think the hospital is equipped to provide that for him.

THE COURT: Doctor, then I understand your recommendation

are as stated in your letter to the effect that if released he is to live with his parents. He is to take the medicine prescribed. He is to return to the hospital for interviews as directed and accompanied by his father, and that he is to cooperate with the rehabilitation unit in seeking employment.

THE WITNESS: Yes, Your Honor.

THE COURT: I will grant the order. Would you submit the appropriate order, Mr. Schoenfeld?

MR. SCHOENFELD: Yes, Your Honor.

THE COURT: Thank you.

* * * * * *

The foregoing is certified to be the official transcript of the proceedings indicated.

Elaine O. Wells
Official Court Reporter

APPENDIX III

Excerpt From Official Hospital
Record of Donald L. Williams
(Appellant in Williams v. Robinson,
(D.C. Cir. No. 23,763, June 19, 1970)).

Form 507
August 1954
the Budget
ular A-32

★ U.S. GOVERNMENT PRINTING OFFICE : 1961 O—547674 83,672

CLINICAL RECORD

Report on _____
or
Continuation of S. F. 507 Notes
(Strike out one line) (Specify type of examination or data)

(Sign and date)

May 10, 1970: Dr. Daniel D. Pugh - Medical Officer (Psychiatry)
mdl RECOMMENDATION FOR UNCONDITIONAL RELEASE AND CHANGE OF DIAGNOSES

Since the time of my evaluation of Mr. Williams in October 1969, an important change has taken place in my evaluation of his case. In October, of course, the great emphasis, in Mr. Williams' case was the question of whether he should have been returned to John Howard Division following his alleged robbery. There was little emphasis exerted by either Mr. Williams or the Court to the question of whether Mr. Williams was mentally ill. At that time I testified in Court that he was mentally ill suffering from drug dependence. I did not believe at that time and I do not believe now that passive-aggressive personality constitutes a valid mental illness. I was aware of the fact that the Courts do not consider drug dependence standing by itself to be a mental illness or to constitute a valid basis for involuntary confinement, and I have had the experience of having the Court order a patient released because he had no illness other than drug dependence. However, since the Court did not choose to make an issue of this question at that time, I did not choose to do so either.

However, over the course of this past winter my opinions concerning drug addiction have undergone a considerable change. Although I do feel that we know enough about the natural history of drug addiction that we could consider it a mental illness, I have come to agree with the Courts that it is not wise to do so, since all available evidence at present suggest that drug addiction has a considerably better prognosis if it is managed through the Courts and correctional systems than if it is managed through hospitals. I, therefore, find myself no longer able to testify in Court that drug addiction ought to be considered a mental illness for purposes of findings of insanity or hospital commitments, and I have on several occasions in the recent past testified in Court that I did not believe drug addiction ought to be considered a mental illness.

This, of course, means that I can no longer see any valid basis for Mr. Williams' continued confinement here under a criminal commitment. Because we have been recently informed that there is a distinct possibility that Mr. Williams may be indicted on the robbery charge from last summer, and because there is the possibility that I would be asked to inform the Court what my opinion with regard to his sanity is, I felt that it would be wise to reevaluate his case as soon as possible in order that there would be no necessity to change my testimony at the last moment, and in a rather unexpected way.

Therefore, when Mr. Williams asked me to reevaluate his case last Friday, May 1, 1970, I agreed to do so. Mr. Williams is presently assigned to Ward a privileged ward and he has been doing very well since he has been there. In discussing his case with his present ward staff and with the ward staff from Ward 11, his previous ward, they were not able to tell me of any evidence of mental

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PATIENT'S IDENTIFICATION (For typed or written entries give: name—last, first, middle; grade; date; hospital or medical facility)
WILLIAMS Donald

Saint Elizabeths Hospital

REGISTER NO. 83,672

WARD NO. JWD

REPORT ON _____ or CONTINUATION OF 507 Notes

Standard Form 507
507-104

Standard Form 507
(Revised August 1961)
Bureau of the Budget
Circular A-32

☆ U.S. GOVERNMENT PRINTING OFFICE : 1961 O—587677 88,672

CLINICAL RECORD

Report on _____
or
Continuation of S. F. 507 Notes
(Strike out one line) (Specify type of examination or data)

(Sign and date)

illness other than Mr. Williams' drug addiction. In interviewing Mr. Williams himself, he was unable to provide me with any evidence of a mental disorder other than his drug abuse. He gave no history of any nervous breakdown or psychiatric contact other than his hospitalizations here. He specifically denied any history of hallucinations, delusions, obsessions, compulsions, phobias, ~~respiratory~~ anxiety attacks, conversion symptoms, memory difficulty other than on a toxic basis, or sexual deviation. I was, therefore, unable to diagnose any mental illness other than drug addiction in Mr. Williams, and I informed him of this.

I have subsequently been reminded of another legal involvement of Mr. Williams in which I might be called to testify. Specifically he has appealed his last writ of habeas corpus and the appeal is shortly to be heard in the Circuit Court of Appeals here. I, therefore, feel that the time has come to make my position on Mr. Williams clear by recommending him for unconditional release at this time on the basis of the fact that he is not suffering from any valid mental disorder and, therefore, cannot be considered to be dangerous by reason of mental disorder.

DIAGNOSES ~~CHANGED TO~~: 304.05 DRUG DEPENDENCE, OPIUM, OPIUM ALKALOIDS AND THEIR DERIVATIVES (IN REMISSION).

~~318.00 NO MENTAL DISORDER.~~
301.81 Passive Aggressive Personality

RECOMMENDATION: UNCONDITIONAL RELEASE AND CHANGE OF DIAGNOSES.

CONDITION ON DISCHARGE: ~~NO MENTAL DISORDER.~~ Recovered.

D. Pugh
Medical Officer (Psychiatry)

Elizabeth Stanciuska
Acting Associate Director
for Forensic Programs

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PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)
WILLIAMS Donald

Saint Elizabeths Hospital

REGISTER NO. 88,672 | WARD NO. ~~[illegible]~~

REPORT ON _____ or CONTINUATION OF 507 Notes

Standard Form 507
507-104

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,362

UNITED STATES OF AMERICA, APPELLEE

v.

HOWARD WEINFIELD, APPELLANT

Appeal from the United States District Court for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
ROBERT J. HIGGINS,
Assistant United States Attorneys.

Cr. No. 1104-69

INDEX

TABLE OF CASES

OTHER REFERENCES

---

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether appellant was entitled to a jury trial to determine whether his conditional release from Saint Elizabeths Hospital should be revoked?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,362

UNITED STATES OF AMERICA, APPELLEE

v.

HOWARD WINGFIELD, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a twelve-count indictment filed on December 22, 1960, appellant was charged with having sold heroin on four separate occasions.[1] On January 13, 1961, appellant was committed to Saint Elizabeths Hospital for a complete mental examination. By letter dated April 12, 1961,

[1] The sales took place on July 12, August 3 and 9, and September 7, 1960. The buyer in each case was Metropolitan Police Officer Ronald T. Joy, who was working undercover. The indictment alleged violations of 26 U.S. Code §§ 4704 (a), 4705 (a) and 21 U.S. Code § 174.

the superintendent of Saint Elizabeths certified to the District Court that appellant was incompetent to assist in his own defense. Neither appellant nor his counsel objected to that report, and on April 24, after a hearing in the District Court, appellant was found incompetent to stand trial and was again committed to Saint Elizabeths. On February 5, 1962, the superintendent of Saint Elizabeths reported that, although still suffering from a mental illness (schizophrenic reaction, catatonic type),[2] appellant was then capable of consulting with counsel and assisting in his own defense. By order dated February 15, 1962, appellant was found competent to stand trial. On April 2 and 3 appellant was tried by a jury before the Honorable Leonard P. Walsh, found not guilty by reason of insanity,[3] and committed to Saint Elizabeths Hospital pursuant to 24 D.C. Code § 301 (d).

On November 9, 1967, the superintendent of Saint Elizabeths informed the District Court by letter of the medical staff conclusion that appellant had sufficiently recovered from his mental illness to be conditionally released from the hospital. After a hearing held in the District Court on December 1, 1967, appellant was ordered to be released from Saint Elizabeths pursuant to 24 D.C. Code § 301 (e) provided that he reside with his parents, continue to take prescribed medicines, return to the hospital for interviews as directed, seek suggested employment and consent to remain in the personal custody of his father.

The records indicate no apparent deterioration of appellant's mental condition for the next eleven months. But on October 27, 1968, appellant voluntarily returned to the hospital. By letter dated November 4, 1969, the

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[2] This diagnosis corresponded to that made by Dr. Lydia Kronfeld of Legal Psychiatric Services, who examined appellant on January 12, 1961, and reported her findings to the Superintendent of the District of Columbia Jail on the same date.

[3] Before the case was submitted to the jury the court granted the government's motion to dismiss all but counts two, five, eight and eleven of the indictment.

superintendent of Saint Elizabeths requested that the District Court revoke appellant's conditional release on the ground that, because of a "deterioration in his psychiatric condition," appellant "would be likely to be dangerous to himself and others if he left the hospital." On May 7, 1970, after a hearing in the District Court, appellant's conditional release was revoked. This appeal followed.

At the revocation hearing appellant was represented by Thomas W. Farquhar, Esquire, of the Legal Aid Agency.[4] The first witness to testify was Dr. James L. Evans of Legal Psychiatric Services, who had examined appellant pursuant to a court order granting appellant's motion that he be examined by an outside psychiatrist at government expense. Dr. Evans testified[5] that in his opinion appellant "was mentally ill and . . . should remain in the hospital" (Tr. 5). According to Dr. Evans, appellant would "be dangerous if he were to be released from the hospital" (Tr. 5).

Dr. Daniel D. Pugh[6] also testified. According to Dr. Pugh, while appellant was on conditional release, his "medication was eventually discontinued by his doctor, and he then had his relapse of his symptomatology" and returned to the hospital voluntarily (Tr. 17). Whatever appellant's subjective reasons for returning,[7] Dr. Pugh stated that "it was quite apparent he was severely psychotic, over-active, very agitated, unable to sit still, un-

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[4] Prior to Mr. Farquhar's appearance in the case, appellant had been represented by Joel D. Forkosch, Esquire, also of the Legal Aid Agency.

[5] On April 3 Dr. Evans submitted a written report of his evaluation of appellant's condition. At the revocation hearing that report was moved into evidence by appellant's counsel (Tr. 6) and is part of the record on appeal.

[6] The transcript erroneously records Dr. Pugh's name as "David M. Pugh."

[7] Appellant "usually" said he "had been in an altercation with his father . . . Sometimes he said he had committed a robbery" (Tr. 11.)

able to stop talking, unable to stop pacing the halls, unable to sleep at night. And his emotions were very volatile. He was very inappropriately cheerful" (Tr. 11.) On the basis of his observations, Dr. Pugh concluded that appellant "would be likely to be dangerous if he were released from the hospital back in the community even on a conditional release" (Tr. 13; *cf.* Tr. 18, 25, 27).[8]

On cross-examination Dr. Pugh indicated that there was no evidence that appellant violated any of the enumerated conditions of his release while he was away from the hospital. Dr. Pugh stressed, however, that "the important question is what his condition is *now* rather than then" (Tr. 16) (emphasis added). Dr. Pugh did not regard appellant's return to the hospital as a sign of dan-

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[8] On direct examination Dr. Pugh explained the delay between the date of appellant's readmission to the hospital and the date that the hospital ultimately sought the revocation of his conditional release as follows:

> Originally, I had decided not to request revocation of his conditional release because he was remaining in the hospital voluntarily. Any time he requested to leave, we would always talk him into staying and I had been under the impression he would make a rapid recovery. The Ward Staff said he had very good response to medication in the past, and I had hoped we could get him well fast enough, and having revoked his release would [not] have to go through a wait of a month or so unnecessarily to get it back.
>
> He hasn't recovered that quickly. He remained quiet on medication and has developed no insight concerning the necessity of medication, and he has not taken up responsibility for his own care to the extent we think he would be able to get along outside the hospital; at the same time, his attorney had been putting more and more pressure on us to release him from the hospital, and I thought in the event any legal action would ensue, it would be best to have his release revoked so there would be no question about the legality of his detention in John Howard.
>
> As I said, Mr. Wingfield's own opinion about his detention would vary. He would frequently ask for releases, but always be talked out of the request. Nevertheless, he would resubmit the request a few days later. So, there was serious question as to whether he was competent to remain on a voluntary commitment. Therefore, the revocation was submitted. It remains, in our opinion, that Mr. Wingfield would be likely to be dangerous if he were released from the hospital back in the community even on a conditional release. (Tr. 12-13.)

ger (Tr. 24) but repeatedly emphasized appellant's consistent refusal to take prescribed medication which was necessary to avoid a complete deterioration of his mental condition (Tr. 11-12, 17, 23). Dr. Pugh concluded that, if released, "it is conceivable that [appellant] might continue taking [his] . . . medication . . . but it is very likely that he would not. I think it is so likely that it would not be safe to let him leave the hospital at this time" (Tr. 29).

Appellant called no witnesses and chose not to testify in his own behalf (Tr. 31). After the hearing was concluded, appellant's counsel asked, apparently for the first time, that a jury be allowed to decide the question of whether his release should be revoked. That request was opposed by the Government (Tr. 38) and was denied by the court, which then revoked appellant's conditional release (Tr. 39).

ARGUMENT

Appellant was not entitled to a jury trial to determine whether his conditional release from Saint Elizabeths Hospital should be revoked.

(Tr. 1-39)

Appellant's sole contention on this appeal is that he had a right to have a jury determine whether or not his conditional release should have been revoked.[9] The short answer is that no such right exists.

We begin by emphasizing that the merits of appellant's novel position should not be considered by this Court. It is true, as appellant avers, that his counsel five times

[9] Appellant's brief makes much of the history of appellant's case prior to the revocation hearing. Indeed, appended to appellant's brief are lengthy excerpts from the file at Saint Elizabeths which were not before the District Court and which, therefore, we would normally move to strike from the brief. Since appellant's sole contention relates to the *form* rather than the *substance* of the revocation hearing, however, these matters are not germane to the issue raised on this appeal and are therefore not further discussed herein.

requested the District Judge to impanel a jury to decide the question of whether his conditional release should be revoked. It is also true, however, that this repeated request was made only after the revocation hearing had been concluded. We submit that if appellant desired a jury trial, he was obligated so to inform the District Court prior to the hearing, or at the very least, prior to its conclusion. Failure to do so should preclude appellant from raising the point on appeal.

Assuming that appellant's claim should be considered, we submit that it is without merit. Appellant's reasoning is tripartite. He first contends that because all other adults in his position have the right to a jury trial, the failure to accord him the same right was violative of equal protection. The problem with that argument is that the factual premise on which it rests is infirm. No other individual in appellant's position is entitled to, or to our knowledge has even been given, a jury trial. The adults to whom appellant points (appellant's brief, p. 12) are entitled to a jury trial on the *original* determination that they should be committed. After that determination has been made, however, no question of *any* patient's status is ever again tried to a jury prior to his unconditional release from the hospital. The hearing afforded appellant, then, was precisely the same as the hearing given a civilly committed patient in the same circumstances.[10] Appellant urges, however, that because he was committed prior to this Court's decision in *Bolton* v. *Harris*, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968), "he is formally no different from any *prospective* civil committee in that . . . he has not been found mentally ill by a jury" (appellant's brief, pp. 22-23) (emphasis added). The simple answer to that contention is that appellant does not stand in the shoes of a "prospective" civil committee but in those of a *previously committed* civil committee on con-

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[10] Essentially the same procedural safeguards surround the revocation of parole for both mandatory releasees and parolees. *See Hyser* v. *Reed*, 115 U.S. App. D.C. 254, 318 F.2d 225, *cert. denied*, 375 U.S. 957 (1963).

ditional release. Moreover, appellant can claim no prejudice due to the absence of a *Bolton* hearing in this case since this Court held in *Bolton* that "the interests of justice and of administrative convenience are best served by applying our ruling prospectively only." [11] Thus the only difference in the treatment afforded appellant and that afforded any other individual sent to Saint Elizabeths was specifically sanctioned in *Bolton* itself.

Alternatively appellant argues that a jury trial was required by due process. At the outset we emphasize that this Court has twice considered the procedural safeguards which must be employed to render a revocation of conditional release compatible with due process.[12] In neither case did the Court hold that a jury trial was required. Similarly, this Court has held that due process does not require a jury determination at a parole revocation proceeding even where the individual in question was a *mandatory* releasee.[13] Against this background, appellant suggests first that a jury "affords the citizen more protection than a judge in this type of proceeding" (appellant's brief, p. 36). Even if that contention is true,[14] it does not bear on the question of whether the mere absence of a jury in a revocation of conditional release proceeding renders that proceeding fundamentally unfair. There is no necessary congruence between the procedural requirements in a criminal case and those imposed by due process in other specialized proceedings, even

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[11] 130 U.S. App. D.C. at 12-13, 395 F.2d at 644-645.

[12] *Friend* v. *United States*, 128 U.S. App. D.C. 323, 388 F.2d 579 (1967); *Darnell* v. *United States*, 121 U.S. App. D.C. 58, 348 F.2d 64 (1965).

[13] *Hyser* v. *Reed*, *supra* note 10.

[14] Court records, however, would seem to belie appellant's thesis that juries tend to reject psychiatric testimony from Government witnesses. Thirty-nine jury trials in civil commitment cases were held during fiscal years 1968 and 1969 and the first eleven months of 1970. The jury found mental illness *and* dangerousness in thirty-five, and mental illness in three of the remaining four. See appellee's Memorandum in Response to Court's Order, *In the matter of Shaw*, No. 23,777, filed October 20, 1970.

where such proceedings are related to a criminal charge.[15] The core of appellant's argument is that due process somehow demands that only a jury can ever deprive an individual of his freedom. We know of no authority which supports that position.[16]

Finally, appellant suggests that "the applicable statutes should be so read as to confer upon appellant the right to a jury trial" (appellant's brief, p. 14). Appellant concedes as he must that neither the statute (24 D.C. Code § 301 (e)) nor its legislative history, nor any case construing the statute, even mentions, much less requires, a jury trial (appellant's brief, pp. 15-17). Nevertheless, appellant argues that the substantial constitutional attack to which the statute would be subjected in the absence of a jury trial requirement should cause this Court to read such a requirement into the statute. This is possible, says appellant, since Congress has not explicitly denied the use of a jury to determine such questions. Appellant suggests that his approach is compelled by *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), and its progeny.[17] We respectfully disagree. These cases, like the other cases to which appellant has referred, all dealt with an *original* commitment. Moreover, all of them held only that equal protection would not countenance gross procedural disparity in the treatment accorded persons whose status was, for all practical purposes, the same. The simple fact is that appellant was treated in exactly the same way as any other individual who is conditionally released either from Saint Elizabeths or from prison. Thus neither *Baxstrom* nor *Bolton*, nor any other case

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[15] *E.g.*, *Greenwood* v. *United States*, 350 U.S. 366 (1956); *Hyser* v. *Reed*, *supra* note 10.

[16] To the extent that appellant implicitly contends that the District Judge's handling of the hearing failed to comport with procedural due process, we submit that Justice Douglas' opinion on behalf of the Court in *United States* v. *Augenblick*, 393 U.S. 348 (1969), is dispositive.

[17] *E.g.*, *Bolton* v. *Harris*, *supra*; *Matthews* v. *Hardy*, 137 U.S. App. D.C. 39, 420 F.2d 607 (1969), *cert denied*, 397 U.S. 1010 (1970).

of which we are aware, provides authority for this Court to read into section 301 (e) a provision which is not there.

Appellant has never contended that insufficient evidence was adduced to support the trial court's revocation of his conditional release, nor could anyone so contend on this record. Both Dr. Pugh of Saint Elizabeths and Dr. Lyons, a private psychiatrist who examined appellant at government expense and at appellant's request, concluded that appellant was both mentally ill and dangerous and should not be permitted to leave the hospital. There was no other evidence presented, and, we submit, any conclusion other than that actually reached would have been in flagrant disregard of the evidence adduced.[18]

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[18] In his brief appellant argues that certain evidence concerning appellant's mental condition and observance of the conditions of his release *prior* to his return to Saint Elizabeths should have been admitted (appellant's brief, *e.g.*, pp. 3, 45-49). But none of the evidence to which appellant refers could have undermined the conclusions reached by the psychiatrists as to appellant's condition on the day of the hearing. We also emphasize that the fundamental "condition" of any "conditional" release is that the mental health of the individual involved not deteriorate to the point that he is again both mentally ill and dangerous. *Friend* v. *United States, supra;* H.R. REP. No. 892, 84th Cong., 1st Sess. 14 (1955); S. REP. No. 1170, 84th Cong., 1st Sess. 14 (1955). The record makes it abundantly clear that, regardless of his observance of specific release conditions, appellant's mental condition had so deteriorated.

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REPLY BRIEF

FOR APPELLANT HOWARD WINGFIELD

IN THE

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24362

UNITED STATES OF AMERICA

v.

HOWARD WINGFIELD,

Appellant

APPEAL FROM THE REVOCATION OF
APPELLANT'S CONDITIONAL RELEASE
FROM SAINT ELIZABETHS HOSPITAL
BY THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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REPLY BRIEF FOR APPELLANT

I.

This appeal raises essentially three issues centering on the revocation without jury trial of appellant's conditional release from Saint Elizabeths Hospital. The first issue is one of statutory construction: is the applicable statute properly read as requiring a jury trial under the circumstances presented by this case? The second issue is whether a reading and application of the statute so as not to provide for jury trial would deprive appellant of the equal protection of the laws. The final issue is whether application of the statute, if so read, would be consistent with due process.

The first issue is reasonably well joined and on it the Government's brief requires no reply. But three aspects of the Government's discussion of the remaining issues seem to confuse, rather than facilitate, joinder and analysis; they call for a brief response.

Briefly stated, appellant's equal protection argument runs as follows: Alone among all adults who may be committed indefinitely to Saint Elizabeths against their will, appellant and adults like him had, when last in court, been given a clean bill of health: under prescribed conditions, a court had ruled, they were not likely to be dangerous to themselves or others upon release from Saint Elizabeths. At the very least there was therefore

> nothing in appellant's situation to justify making it easier to commit him for an indefinite period by omitting some procedural safeguard than it is to commit others.
> (Brief for Appellant, 22)

And appellant described a number of classes of adults who were entitled to a jury trial prior to indefinite involuntary Saint Elizabeths confinement. (Brief for Appellant, 12.) To make it easier to commit him than these others just because his commitment was styled a revocation of conditional release could not be justified by any material difference between him and members of the other adult classes. (Brief for Appellant, 22.)

One of the Government's responses to this argument tends to confuse matters. The Government contends that "[t]he hearing afforded appellant . . . was precisely the same as the hearing given a civilly committed patient in the same circumstances." (Brief for Appellee, 6.) But the point is that no civilly committed patient is ever in "the same circumstances" as a criminally committed conditional releasee. A civilly committed patient may be released to the community at the Hospital's discretion without having to be pronounced fit for release by a judge. He may be so released even if a court could not honestly be assured (as it must be in the case of a conditional releasee) that there is no likelihood of dangerousness. The clear teaching of Hough v. United States, 106 U.S. App. D.C.

192, 27 F.2d 458 (1958), is that the Hospital has far more latitude for experimentation with possibly dangerous civil patients than it has with criminal committees. In the latter case there is no latitude whatever; experimentation must specifically be sanctioned by a court.

Any comparison of appellant's situation with that of civil committees, then, underscores, rather than undercuts, appellant's equal protection claim. Unlike the civil committee, appellant was originally confined to Saint Elizabeths solely on the basis of a jury's reasonable doubt that he was sane ten years ago when he allegedly committed a crime. The civil committee has had a jury trial on the issues of mental health and dangerousness; appellant has never had one. The civil committee has never been judically certified as non-dangerous; after years of hospital treatment a judge specifically held appellant not to be dangerous (under conditions which no one yet claims were broken) and released him. This fact bears reiteration: unlike the civil committee, the last time appellant was before a court he was certified non-dangerous, and was accorded a release status already concededly subject to significant legal safeguards -- safeguards certainly more protective of the patient than those afforded civil committees, for example, on habeas corpus. Darnell v. Cameron, 121 U.S. App. D.C. 58, 348 F.2d 64 (1965); Friend v. United States, 128 U.S. App. D.C. 323,

388 F.2d 579 (1967).*/

II.

In his second constitutional argument appellant contends that to permit revocation of conditional release in situations like his own without provision of a jury trial is to do so without due process of law. At page 7 of its brief the government attempts to analogize the due process aspect of the present case to that of parole revocation cases. The Government cites Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F.2d 225, cert. denied, 375 U.S. 957 (1963) for the proposition that

> due process does not require a jury determination at a parole revocation proceeding even where the individual in question was a mandatory releasee.
> Brief for Appellee, 7 (Emphasis in original.)

The parole analogy does not withstand scrutiny. Each of the mandatory releasees in Hyser was accused of having violated one or more specified release conditions. None of them had returned to prison voluntarily looking for a place to sleep for one night. The authorities had

*/ Among the most significant of these safeguards is the imposition upon the government of the burden of proving that a conditional release should be revoked, whereas a civil committee bears the burden of proof if on habeas corpus he seeks to test the severity, or any other aspect, of his restriction. This difference in treatment can only be understood in light of the fact that the most recent judicial finding vis-a-vis the conditional releasee is always a finding of non-dangerousness. Only such a finding could justify imposition of the burdens imposed upon the government in Darnell and Friend, and, as those cases indicate, recent judicial action is what in fact requires the provision of additional safeguards.

sought them out, arrested them detained them, and returned them to prison for specific parole violations. And involuntary confinement was not at stake in Hyser; at most the mandatory releasees could have been required to serve out their remaining "good time."

Appellant's situation stands out in clear contrast. He has not yet been accused of violating a release condition. He "responsibly" returned to the institution voluntarily, solely for the stated purpose of spending the night. The Hospital has refused to release him since, however, and there is no statutory end to the time he is presently serving.

Finally, and most important, the Government's parole analogy argument proves too much. In Hyser this Court refused to characterize parole revocation proceedings as adversary and to impose upon them even the protections that are already familiar in cases such as appellant's below: Hyser rejected demands for appointment of counsel for indigent parolees, confrontation and cross-examination of sources of information, compulsory process, access to institutional files, etc. Darnell and Friend have long since brought the law of revocation of conditional release from Saint Elizabeths to, and beyond, this point.

And for good reason. Once a person has been found guilty of a federal crime, beyond a reasonable doubt and by a jury if he wants one, his confinement and release

therefrom are controlled by Congress. The first executor of the Congressional will is the sentencing judge, who sets rough limits on the confinement's duration. These limits may be further reduced pursuant to statute in two ways: earning of mandatory early release through "good time," and qualification for conditional release on parole even before eligibility for mandatory early release. But this reduction of the length of confinement is entirely a matter of legislative grace; the fact of confinement itself needs -- and has built in -- but one justification: the initially valid conviction.

Continued confinement of a dangerously mentally ill person, whether civilly or criminally committed, is not at all a matter of similar legislative discretion, based on an immutable one-time justification. Under the D.C. Code and Bolton, both civil and criminal Saint Elizabeths committees have the right to periodic reassessment of the propriety of further confinement, and they may not be confined one moment longer than confinement can be justified by their present condition. All the criminologists, psychiatrists and psychologists in the world could swear that a given criminal had been rehabilitated six months after beginning service of a life sentence. The convict still would have no right to release on parole, let along without conditions. On the other hand, such testimony would require the

immediate unconditional release of a person such as appellant.

Due process standards in discretionary areas such as reconfinement of parole violators, where continued freedom is at best a matter solely of legislative grace, may understandably be less stringent than standards required where the justification for continued confinement is always subject to challenge, and where discretion to reimpose confinement long since ended is limited by very fundamental constitutional considerations. The attempted analogy to revocation of parole, therefore, is actually helpful to appellant in the present context. It serves to illustrate the need for careful attention to the grounds for compulsory confinement in settling upon a suitable procedure for compulsory reconfinement. It will not do merely toassert the applicability of the label "revocation of mandatory conditional release" as justification for applying the same constitutional standards to two basically disparate proceedings.

III.

The Government concludes its argument with the observation that

> [a]ppellant has never contended that insufficient evidence was adduced to support the trial court's revocation of his conditional release.
> Brief for Appellee, 9.

Further along it asserts that

> any conclusion other than that actually reached [on the merits below] would have been in flagrant disregard of the evidence adduced. Id.

Appellant is at a loss to understand whole lines of well-known procedural due process cases if the theory implicit in the foregoing statements, that accuracy of result justifies the means of obtaining it, were to prevail. No one any longer contends that use of coerced confessions is justified by certainty of guilt. Fruits of illegal searches and seizures have long been barred from use in the courts even though these very fruits may be the clearest indicators of culpability. E.g., Weeks v. United States, 232 U.S. 383 (1914). Appellant therefore wishes that the Government had stood by its earlier recognition that

> appellant's sole contention relates to the form rather than the substance of the revocation hearing. Brief for Appellee, 5, n.9 (Emphasis in original).

But appellant cannot let the government's venture into the weighing of evidence go unchallenged.

The Government is doubtless aware of the familiar proposition of hornbook law that judges and juries are free to give as little weight as they wish to expert testimony. The fact that this is permitted to happen, and that juries may be more willing than judges to do so where appropriate, is indeed at the very heart of appellant's due

process arguments. For if there were ever a subject of expert testimony entitled to relatively little blind faith, the present one, prediction of dangerousness of the mentally ill, is it. The pitfalls of prediction have recently been explored by Professor Aaron M. Schreiber, a member of the Patuxent Institution's Board of Review and Advisory Board:

> Experience at the Patuxent Institution confirms the difficulty of predicting dangerous behavior. Approximately 45 percent of those paroled by Patuxent have violated the terms of their parole, 26 percent by committing a new crime. On the other hand, of the 432 inmates released by the courts contrary to the recommendations of Patuxent, all 432 of whom the staff believed were a danger to society at the time of their release, only 137, or 32 percent, committed new offenses. These inaccurate predictions of dangerousness could have resulted in the needless incarceration of 295 individuals -- 68 percent of those released by court order over the staff's objections.
>
> A. Schreiber, Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems, 56 Va. L. Rev. 602, 619 (1970) (citations omitted).

Professor Schreiber also notes that out of 992 criminal inmates who had initially been confined in an institution for dangerous criminals as a result of psychiatrists' assessments alone, only six were returned to that facility after a due process hearing pursuant to the Supreme Court's decision in Baxstrom v. Herold, 383 U.S. 107 (1966). The rest were classified as civil

committees and handled accordingly; many either were fairly promptly discharged, remained on as voluntary patients, or had been given grounds privileges shortly after reclassification. (56 Va. L. Rev. at 620).

Professor Schreiber concludes that

> [i]nstitutional psychiatrists tend to protect themselves against censure for the release of inmates who later commit crimes by overestimating the dangerousness of their patients and retaining them until there appears to be virtually no risk of recidivism. The aftermath in New York following the Supreme Court's decision in Baxstrom v. Herold dramatically illustrates that this practice of "overkill" incarcerates many individuals whom other psychiatrists would not label as harmful. Id. at 619-20.

Seen in this light, appellant's demand for a jury trial on the issue of his future dangerousness cannot be dismissed because there may have been psychiatric testimony below to support what the trial court did. When asked for a trial by jury the court below should have granted the request. Instead it dismissed it out of hand. The ruling should be reversed.

Respectfully submitted,

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